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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 823

SIMS MOTOR TRANSPORT LINES, INC., an Illinois Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION,

On Appeal From The United States District Court
For The Northern District Of Illinois

JURISDICTIONAL STATEMENT

HAROLD T. HALFPENNY
111 W. Washington Street
Chicago, Illinois
Attorney for Appellant

RICHARD F. HAHN
JAMES F. FLANAGAN
MARY SHAW
Of Counsel

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JURISDICTIONAL STATEMENT.

JURISDICTION.

1. This is an action to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission (Appendix 24a) brought under Sections 205(g) of Part II of the Interstate Commerce Act, Title 49, U.S. Code, Section 305(g), Section 10 of the Administrative Procedure Act, Title 5, U.S. Code, Section 1009 and Title 28, U.S. Code, Section 1336 and Sections 2321 through 2323, inclusive.

2. The judgment of the district court, sought to be reviewed, was dated and entered on November 30, 1959 (Appendix 38a). Notice of appeal was filed in the United

States District Court for the Northern District of Illinois (Eastern Division) on January 28, 1960.

3. Jurisdiction to hear this appeal is conferred on this Court by Section 1253 of Title 28 of the United States Code (28 U.S.C. 1952 ed. Sec. 1253).

4. The following cases sustain the jurisdiction of this Court to entertain a direct appeal from an order of a district court of three judges denying an injunction against the operation of an order of the Interstate Commerce Commission;

American Trucking Association v. *United States*, 326 U.S. 77.

Alabama Great Southern Railway Co. v. *United States*, 340 U.S. 216.

American Trucking Association v. *United States*, 344 U.S. 298.

STATUTES INVOLVED

Interstate Commerce Act, Part II (Act of August 9, 1935, 49 State 551)

Sec. 206.(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation of any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to Section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route

or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful; And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter.

Section 312(a) Certificates, permits, and licenses shall be effective from the date specified therein, and

shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

QUESTIONS PRESENTED.

I. Whether the Interstate Commerce Commission erred in:

A. Relying upon the "iron and steel articles" list as set forth in the Descriptions case.

B. In actually changing or modifying the certificate while purporting to interpret it.

C. Deeming the commodity description "iron and steel products", "iron and steel and articles made thereof" to be so patently unambiguous as to preclude all inquiry into the intent of the framers of the certificate descriptions.

D. Limiting the commodities to be transported to correspond precisely with those specifically mentioned in other proceedings.

E. Failing to give due consideration to the interpretation as given by the industry to the words of the certificate.

F. Failing to follow its own definition of "products".

G. In reopening proceedings without assigning such matters for further hearing; and in its résumé of its reopened proceedings.

II. Whether the court below erred in finding that the Interstate Commerce Commission's determination that tractors and foundry machinery are not iron and steel articles or products, is not arbitrary, capricious or clearly erroneous.

STATEMENT

Plaintiff (an Illinois corporation) is engaged as a common carrier of property by motor vehicle in transportation in interstate commerce, as authorized by certificates of public convenience and necessity issued to it by the defendant, the Interstate Commerce Commission (sometimes hereinafter called the "Commission"). Plaintiff's certificate and transportation activities are governed by Part II of the Interstate Commerce Act (Title 49, U.S. Code, Sections 301 following).

The complaint in this action sought to have set aside an order of the Interstate Commerce Commission (App. 25a) finding that plaintiff-carrier was exceeding its authority by transporting certain goods. This appeal is taken from an order of the United States District Court for the Northern District of Illinois (App. 28a) affirming that order and dismissing the complaint.

The finding of the Commission was that plaintiff's existing authority to transport "iron and steel articles", "iron and steel products" and "iron and steel, and articles made therefrom", does not authorize the transportation of "tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery." That these were the only commodities claimed to be without the scope of the carrier's authority was stipulated before the Commission.

Plaintiff's present certificate was issued March 12, 1952, and is a consolidation of several earlier certificates which it had held for a long time. The original certificate was issued November 7, 1938, to Plaintiff's predecessor, pursuant to an application filed with this Commission under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act of 1935. That certificate authorized the

transportation, among other things, of "iron and steel products" and "iron and steel articles". The present certificate also includes the following authority: "iron and steel products", (purchased with the approval of the Commission in 1945); "iron and steel, and articles made thereof", (similarly purchased in 1948); and "iron and steel articles" authority granted pursuant to extension application in 1948 (prior to the entry of a general order in *Ex Parte* MC-37 permitting carriers authorized to serve a municipality to serve all points in the commercial zone of that municipality). These authorities relate to varying geographic origins and destinations, an aspect not involved in this matter.

This was Plaintiff's authority on July 15, 1954 when the Commission, Division 6, on its own motion instituted an investigation pursuant to Sections 204 (c) and 212 (a) of the Interstate Commerce Act into the transportation practices of the Plaintiff. The commodities alleged to have been transported unlawfully were tractors, traction engines, parts and tools; and used foundry machinery.

The testimony and evidence in the record of the proceeding before the Commission on the original "grandfather" application had established that on and prior to June 1, 1935, Jack Foss and Elmer Sims, doing business as Motor Transport Lines, were engaged in business as a common carrier by motor vehicle, operating in Illinois and Indiana.

Shipper witnesses in the proceeding now before the Commission substantiated Elmer Sims' oral testimony that "grandfather" operations also included, under the classification of "iron and steel products" or "iron and steel articles"; tractors, farm machinery, engines, engine parts, springs, steel beds, steel bedsprings, steel furniture, plows, harrow discs, planters and rakes. And Elmer Sims testi-

fied additionally that "grandfather" operations included under such classification: clam shell buckets used on cranes, mining machinery, switch boxes, box covers, box hangers, lathes, drill presses, boring machines, radial drills, cranes and tractors.

The evidence in the record in this case also established that the plaintiff testified in 1950 at a hearing of the Interstate Commerce Commission that since 1931 Sims Motor Transport Lines, Inc. transported, among other things, agricultural parts, air compressors, auto parts, axle staves, bumpers, baling ties, roller bearings, reinforced bars, plates, beams, boiler tubes, concrete road joists, conduits, conveyors, loaders, crankshafts, rough crankshafts, crusher parts, derrick parts, dies, steel punch parts, dipper parts, plow dies, harrow discs, rail rigging, drive shafts, tractor engine parts, engines, fence clamps, fence posts, fertilizer distributors, coil springs, spring plates, sprockets, stabilizers, strip steel, bar steel, structural steel of all kinds, threading machines, tractors and tractor parts.

The plaintiff has over the years transported and is now transporting a substantial volume of the commodities which the Commission now holds that he is without authority to transport. Plaintiff has invested many thousands of dollars in specialized equipment for this transportation, which equipment will not be susceptible to use by plaintiff if the order is sustained.

By report and order of June 23, 1955, a copy of which report and recommended order was attached to the complaint and identified as Exhibit 1 (App. 11a), the Examiner concluded that the transportation of the questioned commodities (tractors and used foundry machinery) was within the scope of the plaintiff's "grandfather" authority. In addition thereto, the Examiner concluded that such

transportation (tractors and used foundry machinery) was beyond the scope of the plaintiff's purchased authority.

Upon exceptions duly filed to the conclusion that the transportation was beyond the scope of the purchased authority, Division 1 on March 13, 1956, issued its report and order which found that plaintiff's Certificate insofar as it authorized the transportation of "iron and steel articles," "iron and steel products", and "iron and steel and articles made thereof", did not authorize plaintiff to transport such finished products as tractors, engines, machinery (new or used, farm or other); agricultural implements, hand or other; metal furniture; or such building products as doors, windows and screens or any other similar finished products, and that any such operation under such authority which plaintiff had been performing or was performing had been and was in excess of its authority and unlawful. A copy of said report and order of Division 1 is attached to the complaint and identified as Exhibit 2 (App. 1a).

Thereafter plaintiff filed a petition seeking, alternatively, rehearing or reconsideration and a stay of the cease and desist order. In its petition plaintiff contended that Division 1 erred in (1) broadening the issues to include commodities not within the issues as agreed upon, (2) failing to find the commodity descriptions "iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof" patently ambiguous, and in refusing for that reason to give due consideration to antecedent matters in interpreting the Certificate, (3) relying upon the "iron and steel articles" list in *Descriptions in Motor Carriers Certificates*, 61 M.C.C. 209, herein called the *Descriptions* case, (4) failing to make findings based on the evidence, (5) failing to consider the proper basis

for plaintiff's claim that the generic commodity descriptions authorized the questioned transportation and that the report ignored the evidence in support thereof, and (6) that the report erroneously concluded that the transportation of certain commodities was unlawful.

In reply, the Bureau of Inquiry and Compliance, hereinafter called the Bureau, conceded that the prior report broadened the issues by covering commodities not contemplated by the parties at the time of hearing, but took issue on all other points.

Upon consideration of the record, of plaintiff's petition, and of the Bureau's reply thereto, the proceeding was reopened for reconsideration. In order to assist in determining the sense in which the words were used at the time plaintiff's authority was granted, the Commission, upon its own motion, reopened the proceedings in Nos. MC 1873, MC-1873S (Sub-No. 6), MC-52139, and MC-2982 for reconsideration along with the title proceeding.

By order dated July 15, 1957, a copy of which is attached to the complaint and identified as Exhibit 3, (App. 12a), the Commission denied the petition for rehearing or reconsideration but modified the order to limit its effect only to tractors, traction engines, tools and parts for such tractors and used foundry machinery.

On August 26, 1957 the plaintiff filed with the Commission a further petition for reconsideration, seeking a reversal of the Commission's prior decision, a finding that the questioned operations were authorized, and a stay of the cease and desist order.

Upon consideration of said further petition, the Bureau's reply thereto, and of the record, the Commission by order of November 4, 1957 reopened the proceeding for reconsideration solely for the purpose of considering

the applicability and effect of its prior decisions relating to "iron and steel products and articles" and indefinitely postponed the effective date of the cease and desist order.

By order dated May 27, 1958, a copy of which is attached to the amended complaint and identified as Exhibit 4 (App. 25a), the Commission affirmed the report which accompanied its order of July 15, 1957, reinstated said order of July 15, 1957, and ordered the plaintiff to cease and desist from engaging in the transportation of tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery on and after July 17, 1958.

The basis of the order of the Commission is that while plaintiff under its Certificate is authorized to transport "iron and steel articles", "iron and steel products", and "iron and steel and articles made thereof", neither from an interpretative standpoint nor from the evidence submitted in support of the grants of authority to predecessors is plaintiff authorized to transport tractors, traction engines, tools and parts for such tractors and traction engines or used foundry machinery.

The said order of May 27, 1958, and the said order of July 15, 1957, reinstated, is each a final order of the Commission.

On August 13, 1957, appellant filed this action in the United States District Court of Illinois (Eastern Division) to set aside and obtain an injunction against the operation of the Commission's cease and desist order. A hearing was held before a district court composed of Court of Appeals Judge F. Ryan Duffy, and District Court Judges William C. Campbell and Walter J. LaBuy, at which the record before the Commission was introduced, briefs were filed and argument held. It is from the order of that court dismissing the complaint that this appeal is taken.

ARGUMENT.

I. THE USE WHICH THE COMMISSION HAS MADE IN THIS (AND OTHER) CASES OF THE "DESCRIPTIONS CASE" SHOULD BE REVIEWED BY THIS COURT.

On October 20, 1952, the Commission promulgated, on its own motion and *ex parte*, what is known as the "Descriptions Case" (*Ex Parte MC* 45 61 M.C.C. 209). That was a lengthy and comprehensive order by which the Commission purported to establish commodity descriptions to be used in the issuance of future motor carrier certificates. The order itself recites that fears had been expressed that "any classification of commodities here established" might be used to interpret existing certificates, and disavowed any intention of so using it. The Commission properly recognized that it had no authority to change or modify existing certificates except as provided by law.

Nevertheless, in spite of this disavowal, the fears expressed at the time of the hearing on this order have proved well-founded: The Commission is relying more and more heavily on the "Descriptions" lists in the interpretation of *existing* certificates.

This continuing process has been described by the Commission itself. Thus in 1953 in *Bell Motor Freight, Inc.*, 61 M.C.C. 569 (9 Federal Carriers Cases 732, 731) the Fifth Division stated:

> "Admittedly the * * * Descriptions report is not intended to be controlling on the construction of certificates already issued * * *. The proceeding, nevertheless was based upon a study of the various fields

> of industry and transportation and of the usual meanings given in trade and commerce to the terms therein considered and *it is inconceivable* that the commodity list there established *should not be given weight* in determining the meaning of past grants of authority." (Emphasis supplied)

This was cited with approval by the Fourth Division in July, 1959 in the opinion in *E. Brooke Matlock*, No. MCF 6886; 13 Federal Carrier Cases §34, 665); that opinion then added:

> "* * * it is clear from the above-indicated decisions that (the *Descriptions*) list may be used as guide in generally ascertaining the commodities that may or may not be transported under previously issued certificates. And, *without evidence to the contrary*, the terms petroleum products and coal tar products, *as specified therein*, cannot logically be construed to mean one thing in a certificate issued after the decision in the *Descriptions* case and something substantially different in certificates issued prior to such decision" (Emphasis supplied)

The Commission has clearly given notice in the above quotation that it will rely heavily upon the *Descriptions* case, in the interpretation of existing as well as future certificates. It thus appears that its similar reliance in the instant action was not casual but rather was in accordance with its established and continuing policy.

The Commission's unquestioning reliance on *Descriptions* here is shown by the record. In its order of July 15, 1957 (Ex. 3), the Commission dutifully recited that the Descriptions lists are "intended to control the interpretation of certificates issued subsequent to such decision"; but then continued, "Although not controlling, they also may properly be considered in construing certificates previously issued in prior cases * * * (Ex. 3

Sheet 8). The Commission then proceeded (*Ibid* Sheet 9) to quote the *Descriptions* case at length, and added: "It will be observed that farm machinery is specifically not mentioned as an article not included in the prescribed list. By the same token, though not discussed other types of machinery, such as tractors, traction engines, and used foundry machinery were not included". (*Ibid*, Sheet 10). And its later order of May 27, 1958 (App. 25a), uses the *Descriptions* case patently and without qualification as a test (App. 33a): "Also considered to be included, and presently set forth in the list of 'iron and steel articles' in appendix V to the report in *Descriptions* * * * are * * *".

It is apparent that the Commission is doing indirectly what it cannot do directly, that is, use the *Descriptions* case to interpret certificates of authority issued before that ruling was made. And the opinion in the judgment from which this appeal is taken makes it clear that *the lower court made the same error.* Like the Commission, its philosophy apparently is "Don't do as I do, do as I say". What the court *said* (App. 46a) was "The Commission did not rely on the *Descriptions* case as being determinative, but rather noted it as one of several factors for proper consideration". What the court *did* was to itself rely heavily on *Descriptions*:

> "In *Descriptions* * * * the Commission established commodity lists under class or generic headings specifying the commodities to be transported thereunder which were to be used in describing the commodity scope of certificates to be issued to motor carriers of property in the future. While it was expressly stated that such commodity lists would be binding only on future certificates, *it is axiomatic* that the definitions of commodity descriptions established by the Commission were based upon the gen-

eral understanding of these terms within the motor carrier industry. One of the generic classifications dealt with by the Commission in the *Descriptions* case was 'iron and steel articles'. The Commission, after extensive hearings participated in by numerous motor carriers and interested parties, expressly found at Page 245, that 'the phrase "iron and steel articles" is understood in transportation circles to mean a list of rough or semifinished articles made from iron and steel'. * * * However, *it is clear from the Descriptions case* and subsequent proceedings that *tractors, traction engines and foundry machinery are much too complicated to be included in the generic classification, 'iron and steel articles'*." (Emphasis added).

The insidious process started by the Commission of relying on the *Descriptions* lists has thus been carried forward by the court below. And its opinion has in turn been cited to support a very similar conclusion in *Ace Air Lines* v. *United States*, U.S. Dist. Court S. D. Iowa, Jan. 25, 1960 (unreported officially; reprinted C.C.H. Federal Carriers Service (81, 295). The court there also cited *Nelson* v. *United States*, 355 U.S. 554, in support of the proposition that the Commission could "give consideration" to the *Descriptions* case, so long as it was not using it to modify or restrict any pre-existing right".

Descriptions was not mentioned directly in *Nelson;* the court may have had in mind the language of that case to the effect that "If the controverted words fairly lend themselves now to the construction made here, they always have done so" (at 561). However, neither *Nelson* as a whole nor that language can justify a policy of reliance by the Commission on the *Descriptions* case. In *Nelson*, the Commission determined in individual cases that the doctrine of intended use applied. That is a very differ-

ent thing from a constant and consistent reliance on a subsequently established list to determine the specific commodities included in a prior certificate.

It is quite apparent that the Commission is coming to rely more and more on its own past investigation in *Descriptions;* it shows a Pygmalion-like instinct for self-admiration. And, as demonstrated by this case and by *Ace Air Lines, supra,* the lower courts have thus far been satisfied with a recitation by the Commission that it has not relied on but has only "considered" *Descriptions.* To be sure, the court are punctillious about adding that the "record as a whole" indicates that the Commission has made an original determination; but this is a tacit recognition that reliance is improper.

The dangers in the course on which the Commission and the lower courts have embarked are evident. From placing admittedly heavier and heavier reliance on *Descriptions* to relying on it completely is a short step—and one which the opinion of the lower court here (*supra* page 14) indicates it is willing to take. Unless this Court intervenes, the proper will gradually shade into the improper. The problem is one of general application, and should be considered by this Court.

OTHER ERRORS ON THE PART OF THE COMMISSION ARE OF EQUAL GENERAL IMPORTANCE.

A. WHETHER THE COMMISSION HAS ACTUALLY CHANGED OR MODIFIED PETITIONER'S CERTIFICATE, WHILE PURPORTING TO "INTERPRET" IT IS A QUESTION OF IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT.

The Commission has always recognized that it cannot change, modify, or revise any outstanding certificate except as expressly authorized by sections 206 and 212 of the Interstate Commerce Act (Title 49 U.S.C.A. §§ 306

and 312). Under Section 212, the certificate may not be "suspended, changed or revoked" unless the conditions of that section are present (*Boulevard Transit Lines* v. *United States*, 77 F. Supp. 594 (D.C.N.J. 1948). And *Nelson* v. *United States*, 355 U.S. 554, 558 f.n. 4, that "limitations on Commission power to modify motor carrier permits, established in Section 212 (a) of the Act, cannot be by-passed under a guise of interpretive action".

Once again, the Commission cannot do indirectly what it cannot do directly. And where an order in effect change a valid certificate, it is invalid whatever it may be called, unless the statutory qualifications are present (*Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905, affirmed 350 U.S. 927). In *Watson*, it was held that a change from authority to transport "general commodities" to one to transport explosives was "an attempt made contrary to Section to 212 to revoke and change a certificate duly issued" (*Ibid* at page 909).

The present situation is within the *Watson* rule. A flat determination that the petitioner cannot transport certain commodities is a mandatory and purely negative order, which severely restricts petitioner's activities. It is in no sense an "interpretation" of the valid certificate held by petitioner.

An interpretation is a making clear of what was not formerly understood; and it is capable of being used as a guide to future conduct (*Comptroller of Treasury* v. *Rockhill*, 205 Md. 226, 107 A. (2d) 93, 98). Thus the reading of the certificate in *Nelson* v. *United States*, 355 U.S. 554, was correctly considered to be an "interpretation" of it, because it gave the carrier an understandable guide by which it could conduct its business in the future. In contrast, petitioner here now knows no more about its

authority than it did before except that it may *not* transport named articles (which are "made of iron and steel", and which it transported under its grandfather authority).

The question is one of great importance to the entire motor carrier industry. Can the Commission (in the absence of the conditions enumerated in Sec. 212), chip away bit by bit at a certificate, by negative orders not to transport this and that commodity? This Court's authoritative word is required.

B. THE CONTENTION HERE THAT THE COMMISSION AND THE COURT BELOW ERRED IN CONSIDERING THE CERTIFICATE OF AUTHORITY SO PATENTLY UNAMBIGUOUS AS TO PRECLUDE ALL INQUIRY INTO THE INTENT OF THE FRAMERS OF THE CERTIFICATE, IS ONE OF SUBSTANCE.

The Commission here considered the authority to transport "iron and steel products", "iron and steel articles" and "iron and steel and articles made thereof", as patently unambiguous. If the Commission is right about that, it would seem that it is wrong in its decision, because tractors and foundry machinery are in fact "made of" iron and steel. But if the Commission does not agree with the obvious lay interpretation, then it should have considered the interpretation given those words by the industry, and it erred in failing to do so. (*Freightway Corporation Extension*, 51 M.C.C. 227, 230; *Interstate Van Service, Inc.*, 62 M.C.C. 325, 329; *Dunn v. Lahotski*, 62 M.C.C. 103, 104).

However, that the commodity descriptions are not obviously certain, but on the contrary are ambiguous (*i.e.*, doubtful, uncertain, capable of being understood in two or more possible senses), is vividly illustrated by the record of this proceeding. The Examiner found that

the terms of the certificate "are phrased in general terms susceptible of different interpretations", and that accordingly the "intent of the framers is the only safe criteria". (Exhibit 1, Sheet 9). Division 1, on the other hand, found that there was no "patent ambiguity such as would justify resort to antecedent or extraneous matters in order to ascertain the true meaning of the description used". (Exhibit 2, Sheet 6). The experts, apparently differ.

We are quite certain that neither the Bureau of Inquiry & Compliance, nor the Examiner, nor Division 1 was being frivolous in advancing its particular construction of the commodity descriptions. Further, in the words of Division 1: "We are convinced that respondent has construed its certificate in good faith with at least some color of justification * * *."

That commodity descriptions, such as those involved in this proceeding, are ambiguous is evident from the foregoing. Similar descriptions have been recognized as ambiguous in the following cases:

"Iron and steel articles,"

Deaton Truck Lines, Inc., Application No. MC 11207, By full Commission, 43 M.C.C. 585 at 592;

"Iron and steel and products thereof,"

J. C. Johnson, Application, No. MC 84726, By Division 5, 61 M.C.C. 783;

"Petroleum products,"

R. B. Wilson, Application, No. MC 9895, By Division 5, 64 M.C.C. 39.

It must be noted that the opinion of the lower court here indicates uncertainty on this point. It says only that "* * * it is clear from the record, from transportation parlance and from various cited cases that there is

nothing patently ambiguous in 'plaintiff's certificate." This leaves us in doubt as to what parts of the record and what "transportation parlance" the court had in mind; and even recourse to the Government's brief below fails to make it clear what the "various cited cases" were. The court below has failed to justify the Commission.

Although it is true, as the court below pointed out in another part of its opinion, that the Commission said that:

> "Contrary to the claims of respondent there is nothing patently ambiguous in the certificate * * * and for that reason there was no necessity for going back of it in order to determine what was intended. *Nevertheless, we have done so.* * * *" (Emphasis supplied)

An examination of that nature, however, cursorily made in the face of an assertion that it was unnecessary, can hardly suffice.

C. THE COMMISSION ERRED IN LIMITING THE COMMODITIES TO BE TRANSPORTED TO CORRESPOND PRECISELY WITH THOSE SPECIFICALLY MENTIONED IN OTHER PROCEEDINGS.

The Commission, in its report of July 15, 1957, erred in concluding: (App. 18a)

> "There is nothing of evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that respondent's predecessors were being granted authority to transport tractors, traction engines, tools, and parts for such tractors and traction engines, or used foundry machinery, or that they then understood they were obtaining such authority."

The Commission is inconsistent in its reasoning. They contend that the language is not ambiguous and therefore they do not have to consider what was meant by the framers of the original certificates and purportedly did not consider the original intent as the proceedings were reopened "solely for the purpose of considering the applicability and effect of certain decisions of the Commission relating to "iron and steel products and articles", but as quoted above refer to the evidence in the "basic proceedings". We have pointed out the error of the Commission in reopening said proceedings.

Frankly, whether or not a tractor was transported prior to the "grandfather" days or whether a tractor was named specifically in any of the testimony in any of the other related cases is of little consequence nor is it in any way controlling. The question is merely one as to whether or not the language in the certificate covers the commodities as involved. To hold otherwise would be in total disregard of a long line of cases as decided by the Commission, and reference is first made to that contained in *Smith Common Carrier Application,* 31 M.C.C. 296, 297, reading as follows:

> "Under the circumstances, a limitation of the commodities which applicant may transport, to correspond precisely with those specifically mentioned by his witnesses, is not warranted. Such a limitation would serve no good purpose, but would only impair the usefulness of the carrier's service."

And then, in *Eastern Carrier Corp. Common Carrier Application,* 28 M.C.C. 481, 482, the Commission found:

> "While applicant has not transported all types of textiles, it has transported various types thereof. Because of constantly changing conditions in the textile industry, we are of the opinion that appli-

cant should not be restricted to the transportation of specific types of textiles, but that it should be authorized to transport any type of textile which may be manufactured in the territory which it serves."

Reference is next made to *Fleetline, Inc.* v. *Osbourn Trucking Co.*, 54 M.C.C. 221, 227:

"That portion of defendant's authority with which we are here concerned does not authorize the transportation of specific items, but rather authorizes the transportation of certain general classes of commodities. Such a description is sufficiently flexible to allow for variation in the commodities which may be transported as new and different commodities are used. The commodities which may be transported are varied and numerous. Accordingly we deem it impracticable and shall not attempt herein to make a complete list of what defendant may or may not transport. Instead we shall indicate our view with respect to certain of the transportation which has been performed and attempt to set guides for defendant's future conduct."

A finger is also pointed to *Arrow Transp. Co. of Delaware* v. *Collett*, 53 M.C.C. 411, 414:

"These arguments are based, in part at least, upon the fact that since the pipeline terminals at Evans, Twin Falls, and Boise were not in existence at the time defendant's certificates were issued, the Commission could not have contemplated the picking up of traffic at such points, and, in fact, could not have made the findings of public convenience and necessity in respect thereof which are required by section 207 of the act. Such arguments entirely overlook the fact that certificates of public convenience and necessity issued by the Commission are granted upon a finding, among other, that the proposed service, to the extent to be authorized by the certificate, is or 'will be' required by the present or 'future' public convenience and necessity, and that they are not

intended to limit the holder to the transportation of specific traffic moving at the time such certificates were granted. Once a carrier is authorized to serve a given point, it may continue, within the scope of its certificate, to handle all traffic offered for movement to and from that point, and it is immaterial that certain specific traffic may not have been moving at the time the certificate was granted. Similarly, carriers such as complainants, which are authorized to serve all points in a defined territory, may, within the scope of their certificates, serve points which may not have been in existence at the time their certificates were granted."

See too, *Ford Bros. Extension of Operations—Virginia*, 47 M.C.C. 731, 735; *Grimes Contract Carrier Application*, 22 M.C.C. 22, 23-24; *Ellington Bros. Common Carrier Application*, 10 M.C.C. 142, 143-144; *Miller Extension of Operations*, 21 M.C.C. 401-403; and *Strawn Extension of Operations—Ohio*, 23 M.C.C. 281, 283.

D. THE COMMISSION ERRED IN FAILING TO GIVE DUE CONSIDERATION TO THE INTERPRETATION AS GIVEN BY THE INDUSTRY.

The Commission, in a long line of cases, has held that in determining whether or not a particular article is embraced within a commodity description in a carrier's operating authority, it must be governed to a great extent by what the article is considered to be in the industry.

"In determining whether or not a particular article is embraced within a commodity description in a carrier's operating authority, we must be governed by what the article is considered to be in the industry." *Freightway Corporation Extension—Metal Forgings*, 51 M.C.C. 227, 230.

"In determining whether or not a particular article is embraced within a commodity description in a

carrier's operating authority, we must be governed to a great extent by what the article is considered to be in the industry." *Interstate Van Service, Inc., Ext. —Trailers & Passengers*, 62 M.C.C. 325, 329.

"In that proceeding, the Commission stated that 'in determining whether or not a particular article is embraced within a commodity description in a carrier's operating Authority, we must be governed by what the article is considered to be in the industry.'" *Dunn* v. *Lahotski*, 62 M.C.C. 103, 104.

The Commission, disregarding the long line of its decisions, ignores the plaintiff's evidence in this case, which demonstrates conclusively that the iron and steel manufacturing industry and the transportation industry, both consider the term "iron and steel articles", "iron and steel products" and "iron and steel articles made thereof" embrace any item manufactured wholly or principally from iron or steel, including the commodities in question.

Two witnesses for the Bureau of Inquiry & Compliance testified that for rate-making purposes they did not consider the questioned commodities to be "iron and steel articles" because the commodities were not on the iron and steel article tariff list used by them in determining rates. The third witness on behalf of the Bureau interpreted "iron and steel articles" to mean items on his iron-and-steel articles tariff list "because it is unreasonable for me to sit here and try to determine to what degree an article should be manufactured" before it might cease to be an "iron and steel article" and become something else.

None of the Bureau's witnesses attempted to testify to the meaning of the commodity descriptions in the iron and steel industry or the motor carrier industry. They

applied a wholly subjective test—the meaning of a phrase for their own particular purpose.

Compared with this was the testimony (supporting that of the respondent's president) of five traffic experts having a total of 161 years in the transportation nationally of commodities of the nature involved. Each and every one of these traffic experts (who have had the responsibility of construing commodity descriptions in many hundreds of certificates and permits) testified unequivocally that in the transportation industry and in the iron and steel industry the commodity description "iron and steel products" embraces any commodity manufactured principally from iron or steel, including the commodities in question in this proceeding.

It was further explained that iron-and-steel-articles lists in tariffs are prepared purely for rate-making purposes, grouping into one rate-class many commodities having similar characteristics that permit the establishment of one fair rate for all of the items in that group; that the iron-and-steel-articles lists are not uniform with respect to commodities contained therein; that such lists issued by various rate agents differ according to the needs of their respective clients; and that motor carrier certificates are never interpreted from commodity-lists prepared for rate-making purposes.

The evidence in the record shows that the industry meanings of the plaintiff's certificate fully support the plaintiff's construction of the certificate.

The Commission, disregarding the industry meanings, applied a "degree of manufacture" test to determine whether the commodity is an "iron and steel product" and that this test is erroneous is evident from the following decisions:

In *McCullough Transfer Co.*, Application, No. MC 10900, 54 MCC 241, it was held by Division 5 that

> "* * * authority to transport 'steel articles' embraces any item manufactured wholly or principally from steel."

In that case, it was held that rough or semi-finished items such as ingots, sheets, bars, angles and tubing were "steel-mill products," and were only a small portion of all the items encompassed in the wider classification of "steel articles."

In *Brown & Rasche*, Extension, No. MC 68119 Sub 1, 8 FCC 32,183, it was held that "iron and steel products" embraces finished products such as cans and covers composed of 95% iron and steel with outer coating of paint and inner coating of lacquer.

In *Portland Motor Transport*, Extension, No. MC 105024 Sub 1, 8 FCC 32,369, Division 5 stated:

> "Upon this record we are of the opinion that the commodity paracol should be classified as a petroleum product inasmuch as the principal ingredient other than water is petroleum wax as the testimony herein indicates." (Emphasis supplied.)

And the full Commission, in *Deaton Truck Lines, Inc.* Application, No. MC 11207, 43 M.C.C. 585, holds that the term "iron and steel articles" even embraces knocked-down prefabricated steel houses "manufactured wholly or principally from iron and steel."

E. THE COMMISSION COMMITTED FURTHER ERROR IN FAILING TO FOLLOW ITS OWN INTERPRETATION AS GIVEN BY THE INDUSTRY.

The dictionary definition of "products" is anything produced. Seemingly, in the past, because of the long unin-

terrupted operations openly conducted with the knowledge of the Commission staff, both Respondent and the Commission saw "eye to eye" and the commodities transported were considered as iron and steel articles or iron and steel products. There is full support for this contention, even from the Commission's own decisions there is spread here, word for word, that which has been taken from *Wilson Common Carrier Application*, 64 M.C.C. 39, 41:

> "That we have always made a distinction between a commodity and the products of that commodity is evident from other cases. For example, in *Humes Extension of Operations*—Indiana, 48 M.C.C. 455, the Commission, division 5, concluded that applicant therein, who held authority to transport 'wire products' was not authorized to transport 'wire', and stated (Page 457) that 'Wire products describes commodities of a definite type or class, that is, articles made principally out of wire.' And in *Vaughan Interpretation of Certificate*, 52 M.C.C. 204, the Commission, division 5, in finding that authority transport 'cotton and cotton goods' included authority to transport 'cotton yarn,' stated (page 205):
>
> > 'The use of the two expressions "cotton" and "cotton goods" shows an intent to grant authority to transport both the raw material and finished products thereof.'"

Commodities manufactured wholly or principally from iron and steel, in the words of the Commission, are included within the general class of iron and steel articles which applicant is authorized to transport.

In the case of *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695, 703, the Commission, after indicating that Hart & Clark held authority to transport "steel products", reasoned as follows:

"In *Deaton Truck Lines, Inc.*, Common Carrier Application, 43 M.C.C. 585, the Commission had before it the question, among others, of whether applicant therein should be authorized to transport knocked down steel houses. In that proceeding, the Commission stated, (page 592):

> Applicants' petition does not disclose whether the knocked-down steel houses which it desires to transport are manufactured wholly from iron and steel or whether, as seems likely, they also contain other materials. In our opinion, knocked-down steel houses manufactured wholly or principally from iron and steel may be included within the general class of iron and steel articles which we shall authorize applicant to transport. The authority hereinafter granted to transport iron and steel articles, however, should not be construed as authorizing the transportation of knocked-down steel houses or any other articles which are manufactured principally from materials other than iron and steel.

"In view of the above, we conclude that Hart & Clark may transport knocked-down steel houses which are manufactured wholly or principally from steel."

Reference was but a moment ago made to the *Humes* case where it was specifically shown that wire products described commodities of a definite type or class, that is, to-wit: articles made principally out of wire. This has been reiterated, for in *Iron and Steel From and To Maryland*, 62 M.C.C. 389, 395, the Commission, itself, tied the definition of iron and steel products into the broad realm of wire products and the following phraseology is to be found: "The words 'iron and steel' and 'iron and steel products' include sheets, plate, pipe, bars, wire products and other articles on which the proposed rates would apply."

It took the Commission many years and a reversal of a previous decision to interpret even the term structural steel. In 54 M.C.C. 664 (*Carroll* Case), it was held that the authority included only the right to transport channel steel or steel channels when that commodity is to be used as a structural material in the construction of buildings, bridges or similar structures. Then, in 62 M.C.C. 348, the prior report was modified and the certificate authorizing the transportation of structural steel was found to include authority to transport channel steel or steel channels to be used in the manufacture of frames for automotive lift trucks. It would thus appear that there was, even in the minds of the Commission, confusion relating to a single item produced at a steel mill.

III. THE COURT BELOW ERRED IN FINDING THAT THE INTERSTATE COMMERCE COMMISSION'S DETERMINATION THAT TRACTORS AND FOUNDRY MACHINERY ARE NOT IRON AND STEEL ARTICLES OR PRODUCTS, IS NOT ARBITRARY, CAPRICIOUS OR CLEARLY ERRONEOUS.

The original and amended complaints here charged that the finding of the Commission requiring plaintiff to cease transporting tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery, is "arbitrary, discriminatory, capricious and without warrant of law". The court below erred in not upholding this allegation.

As we have demonstrated above, the findings of the Commission were arbitrary and capricious in that they were the result of the Commission's relying too heavily on the *Descriptions* case, failing to recognize that the wording of the certificates was ambiguous, and failing to give consideration to the interpretation of the industry

or even to the Commission's own definitions. Those arguments will not be repeated here.

That the Commission's determination is arbitrary and capricious is shown not only by the factors just mentioned, but by the opinions of the Commission itself. These indicate a confusion and inconsistency not compatible with reason and justice.

The Examiner's opinion was overruled; it is accordingly appropriate to begin with the opinion of Division 1 (App. 1a). That opinion stated that "iron and steel articles", "iron and steel products", and "iron and steel and articles made thereof" are "synonymous" with one another (Rec. 17), but it failed to say synonymous with what else, except perhaps with everything in the "iron and steel articles" list in *Descriptions*, plus something further here unspecified. (Rec. 18 and 19).

In the opinion by the Commission of July 15, 1957 (App. 12a), a "finished manufacture" test was adopted from *Descriptions*—*i.e.* that articles are not included in "iron and steel articles" which have been "manufactured or finished beyond a certain stage". (Sheet 9). In its "Second Report On Reconsideration" (May 27, 1958, Exhibit 4), the Commission took yet another tack. It there reasoned that plaintiff was authorized to transport "iron and steel" and "iron and steel articles". "Iron and steel" it felt meant commodities that did not require further processing; "iron and steel articles", those that are "rough or semifinished articles (or products) made from iron and steel". As examples it listed nails, bolts, castings, manhole covers, pipe, and forgings. But this is neither logical nor helpful, since nails, bolts and manhole covers, though not works of art, are not necessarily "rough", and are as "finished" as they will ever be. And *Cf. McCullough Transfer Co.*, No. MC

109000, 54 M. C. 241; and *Brown & Basche, Extension, No.* MC 68119 Sub 1, 8 FCC 32,183).

It is respectfully submitted that the lack of logic and confusion in the Commission's own opinions, which were not clarified by the court below, taken in connection with the other circumstances mentioned above, demonstrate that the Commission's determination was arbitrary and capricious.

CONCLUSION.

This is not a case where a carrier suddenly engages in a new and different business by letting his imagination run wild in interpreting his certificate. The character of the plaintiff's operations has not changed since its predecessors commenced business prior to 1935, the "grand father" date under the Motor Carrier Act.

That it be allowed to continue this operation is obviously of great importance to the appellant here. Beyond that, the practices of the Commission here discussed are constantly applied to many other carriers. A determination of their propriety is accordingly important to the industry as a whole.

Respectfully submitted

HAROLD T. HALFPENNY
Counsel for Appellant

RICHARD F. HAHN
JAMES F. FLANAGAN
MARY SHAW
Of Counsel

APPENDIX

INTERSTATE COMMERCE COMMISSION.

No. MC-C-1674

SIMS MOTOR TRANSPORT LINES, INC.,

REVOCATION OF CERTIFICATE

Decided March 13, 1956.
(Served March 28, 1956)

Respondent found to have been and to be engaged in the transportation of certain commodities made wholly or partly of iron or steel not authorized in its certificate in violation of the Interstate Commerce Act. Cease and desist order entered.

Harold T. Halfpenny, Richard Hahn, and *Howell Ellis* for respondent.

Hugh E. Lillie, James Y. Piper, Ellis V. Gregory, and *Nell Guinn* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Claude G. Metzler for interveners.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MITCHELL, TUGGLE, AND MINOR

BY DIVISION 1:

Exceptions were filed by respondent to the order recommended by the examiner, and the Bureau of Inquiry and

Compliance, Interstate Commerce Commission, hereinafter called the Bureau, replied. Our conclusions differ somewhat from those recommended.

By order dated July 13, 1954, the Commission, division 5, on its own motion, instituted an investigation, under authority of sections 204(c) and 212(a) of the Interstate Commerce Act, into the practices of Sims Motor Transport Lines, Inc., hereinafter called respondent, for the purpose of determining whether it is and has been engaged in the transportation of certain commodities not within the scope of its certificate, in violation of section 206(a) of the act and the terms and conditions of said certificate.

The examiner found that the operations of respondent in the transportation of such products as tractors, tractor engines, and parts thereof, and foundry machinery, other than (1) between points in the Chicago commercial zone, on the one hand, and, on the other, Indianapolis, Lafayette, and South Bend, Ind., Kankakee and Bradley, Ill., (2) between South Bend and Bradley, (3) from Fort Wayne, Ind., to Chicago, and (4) from Waukegan, Ill., to Indianapolis, have been and for the future will be unlawful and in violation of section 206(a) of the act and of the terms and conditions of its certificate; but that such past unlawful operations had not been wilfull.

The examiner's findings are based on his conclusions that where, as here, the commodity descriptions are phrased in general terms, they should be construed to reflect the intent of the framers, and that such intent can be determined only by considering the character of the evidence upon which the descriptions were predicated. Accordingly, he concluded that the intent in granting authority to transport "iron and steel articles," and "iron and steel

products," in the "grandfather" clause application of respondent's original predecessor, No. MC-18738, was to authorize the transportation of the broad class of commodities for which respondent here contends, that is, any article or product manufactured wholly or principally of iron or steel. The examiner also concluded that the intent in granting substantially the same commodity descriptions in the certificates issued to the other predecessors of respondent was to grant only the limited scope of commodities for which the Bureau contends, that is, the list of "iron and steel articles" specified in appendix V, to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, herein called the *Descriptions* case. In reaching these different conclusions, the examiner was guided by his analysis of the evidence underlying the grants in the respective application proceedings.

In its exceptions, respondent disagrees with the examiner's conclusions in certain respects, and alleges error in considering facts not of record and in evaluating the evidence. Respondent also asserts that the recommended order will deprive it of the right to transport commodities of the type which it has been handling since prior to the "grandfather" date and constitute a taking of property without due process of law. The Bureau, in reply, upholds the findings and conclusions of the examiner and asserts that there is a sufficient factual and legal basis for his recommended report and order.

Consideration has been given to the evidence adduced, the briefs filed, the examiner's recommended report and order, respondent's exceptions, and the reply of the Bureau. The essential facts are not in dispute but they give rise to questions of law which form the issues in this case. For convenience, they will be restated briefly.

After the order of investigation, and in satisfaction of a motion "for more definite allegations" respondent and the Bureau stipulated: that respondent holds a certificate authorizing operation in interstate or foreign commerce, in the transportation of "iron and steel products," "iron and steel articles", and "iron and steel, and articles made thereof", from and to specified points in several States; and that, from July 8, 1953 to April 14, 1954, respondent under such authority transported twenty shipments from Chicago and Melrose Park, Ill., to certain points in Indiana, Kentucky, and Ohio, consisting of articles described as "tractor, NOIBN, steam or internal combustion", "engines, traction, and parts and tools", and "used foundry machinery". Although the articles just described are the only articles named in the stipulation, the parties further agreed that additional evidence might be presented and such evidence was adduced by respondent to show that for many years it has served four shippers in the transportation of certain articles moving inbound to their factories from steel mills, and outbound from their factories to customers and warehouses. There is no dispute concerning the inbound articles moving from the steel mills but only as respects the outbound articles moving from the shipper's factories and respondent now argues that by reason of the stipulation the only commodities now involved are those named therein. In our opinion consideration may properly be given to the evidence relating to other outbound articles since the order of investigation is broad enough to cover the transportation thereof. In this connection, it may be observed that the investigation relates solely to the commodities which respondent may transport. The geographical aspect raises no issue as to scope of past operations. The outbound articles shipped by the four shippers include (1) farm machinery (tractors, traction engines, and parts thereof), (2) agricultural im-

plements (plows, harrow disks, planters, and rakes), (3) steel furniture (beds, bed springs, chairs, chests, and dressers), and (4) metal building products (joists, beams, trusses, forms, braces, doors, windows, screens, lathing, and, roofing and accessories).

Respondent takes the position that it is authorized to transport the disputed articles by virtue of the generic commodity descriptions shown in its certificate, under the theory that such generic descriptions permit the transportation of any article or pr luct manufactured wholly or principally of iron or steel. The Bureau contends that the generic descriptions include only those articles made by the first manufacturing process from raw materials, and not those which are completely manufactured articles or products even though composed principally of iron and steel. The Bureau urges that the generic descriptions may properly be construed by reference to the list of "Iron and steel articles" in appendix V to the report in the *Descriptions* case; *supra*.

Insofar as pertinent herein, respondent's certificate contains three generic commodity descriptions, namely: "iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof". The latter description may be logically divided into two parts: the first part includes the basic materials of iron and steel, and the last part includes articles made of iron and steel. Although worded differently in each instance, we are unable to perceive any important distinction between the various commodities that are embraced within these three descriptions, and conclude that they are synonymous. This conclusion is in accord with that reached in the *Descriptions* case, wherein the term "iron and steel articles" was employed as the generic commodity description in preference to similar terms used in motor carrier certificates.

In construing motor carrier authority consideration may properly be given to the record upon which such authority was granted and other extraneous matters *only* if the authority is itself indefinite or ambiguous. If not patently indefinite or ambiguous it must be construed according to its terms regardless of what may have been intended.

Here, although a question may arise, as it has, as to exactly what articles are embraced within the terms "iron and steel products" or "iron and steel articles", this situation does not amount to a patent ambiguity such as would justify resort to antecedent or extraneous matters in order to ascertain the true meaning of the description used and in our opinion the examiner was wrong in so doing. The only question here is whether or not respondent has conducted unauthorized operations by transporting articles which do not come within the unambiguous commodity descriptions of its certificate. The answer to this question depends upon an interpretation of the authorized commodity descriptions.

The commodity lists formulated in the *Descriptions* case are intended to constitute a guide in the preparation and filing of applications and in the interpretation of certificates issued in the future. Notwithstanding such limited purpose it is clear that the lists therein established must, or properly may be, considered also in the construction of certificates or permits previously issued. It would be anomalous to say that a particular class description means one thing for the future and something different for the past. However in the case of grants not restricted by reference to any established list, resort may also be had to the usual meanings in commerce and industry, as well as academic definitions.

Giving due weight to the list of "Iron and steel articles" prescribed in the *Descriptions* case it must be concluded

that each of the three descriptions in respondent's certificates: "Iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof" should be interpreted as embracing all the commodities shown in the list of iron and steel articles", in appendix V to the report in the *Descriptions* case.

This conclusion conforms to the Bureau's contention. However, the Bureau contends that the "iron and steel articles" list limits and marks off the full extent of respondent's authority as respects articles of iron and steel manufacture. Since the grants are not limited by reference to the list, we do not agree. In the report in the *Descriptions* case, it was recognized that completely comprehensive lists of commodities under the various groupings could not be prescribed and, therefore, provision was made for additions to, or deletions from, the various commodity lists. A grant of authority by reference to a list is specific and limited accordingly but a grant of "Iron and steel articles" without reference to the list whether made before or after the list was prescribed, is not so limited and may include other articles of this class even though not listed.

Turning to the disputed articles which respondent actually has transported under its interpretation of its certificate, we note that they include specifically, "tractors, steam or internal combustion", "engines, traction", "used foundry machinery", and generally, farm machinery, agricultural implements, metal building products, and steel furniture. The contention that all these articles are included in the description "iron and steel articles" was advanced in the *Descriptions* case by this respondent without success.

Concerning the inclusion in the iron-and-steel-articles list of finished manufactured articles which are made of

iron or steel and of articles made only in part of iron or steel the Commission in the *Description* case said at page 245 and 247 (emphasis added):

IRON AND STEEL ARTICLES

The phrase "iron and steel articles" is a commodity description that has been used for years to describe a large group of commodities manufactured from iron and steel on which the carriers applied the same basis of rates, because of similarity of transportation conditions. Although some of the rail and motor carrier tariffs describe the commodities as "articles of iron or steel manufacture" the phrase "iron and steel articles" is understood in transportation circles to mean a list of rough or semi-finished articles made from iron and steel. *In Iron and Steel Articles*, 155 I.C.C. 517, we had under consideration the railroad rates on iron and steel articles within central territory and appended thereto a list of such articles. *In Central Territory Motor Carrier Rates*, 23 M.C.C. 435, division 5, in order to eliminate differences of opinion as to which commodities were included within the description "iron and steel articles" as used in motor carrier tariffs, approved and set forth therein a list of such commodities. Although the rail list was approved in 1929, and the motor-carrier list in 1940, hereafter called the approved lists, they are for the most part the same.

The industry-proposed list does not include every kind of iron and steel article, nor is it so intended. Many steel companies manufacture *steel furniture*, but the list does not include that commodity. Neither does the list include *farm machinery and many other articles made entirely from steel*. The proposed list includes those commodities which the carriers specializing in the transportation of iron and steel articles have been hauling for many years. The approved lists differ from the proposed list in that some articles

are not included if they *have been manufactured or finished beyond a certain stage.* To illustrate, the industry suggests the term "annealing pots" without further limitation, whereas, the Commission-approved lists restrict annealing pots to those "in the rough", or "not advanced in the stage of manufacture beyond the casting process". None of the articles in the proposed list has been restricted based on the percentage of nonferrous metal contained therein.

It will be observed that the Commission specifically mentioned "steel furniture" and "farm machinery", as articles not included in the prescribed iron-and-steel-articles list. The same reasoning which resulted in the exclusion of "steel furniture" and "farm machinery" from the prescribed list of iron and steel articles precludes a finding now that they fall within any previously issued grant of authority to transport "iron and steel articles" and by analogy the same result obtains in the case of other types of machinery, such as "tractors", "engines, traction", "used foundry machinery", and "agricultural implements, other than hand". None of these articles can be considered to be iron and steel articles, as that term is used in motor carrier operating authorities even though they may be manufactured principally of iron and steel. Finished agricultural implements of the hand type, likewise, should be considered distinct from iron and steel articles. The articles described as "metal building products" constitute a borderline category. Some articles therein are included in the iron-and-steel-articles list, namely: steel joists, beams, trusses, forms, braces, and lathing, and steel roofing and accessories. Others such as finished doors, screens, and windows are not. "In our opinion of all the disputed articles in the group which are not included in the iron-and-steel-articles list do not come within any of the three generic commodity descriptions here at issue. Respondent,

therefore, is not authorized to transport these disputed articles. All, like steel furniture and machinery are finished products of manufacture beyond the iron-and-steel-articles classification."

The Commission's order of investigation provides that in the event it is found that respondent has wilfully violated the act, or any term, condition, or limitation of its certificate, an order then may be entered suspending or revoking its certificate. We are convinced that respondent has construed its certificate in good faith with at least some color of justification and has not operated in willful violation of its provisions. No suspension or revocation is warranted. Our findings herein will put respondent on notice as to the manner in which it should conduct operations in the future.

We find that respondent's certificate, insofar as it authorizes the transportation of "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof", does not authorize respondent to engage in operation as common carrier by motor vehicle, in interstate or foreign commerce, of such finished products as tractors; engines; machinery (new or used, farm or other); agricultural implements, hand or other; metal furniture; or such metal building products as doors, windows, and screen; or any other similar finished products, and that any such operation under such authority which respondent has been performed or is performing, has been and is in excess of its authority, and unlawful.

An order will be entered requiring respondent to cease and desist from all operations in interstate of foreign commerce, of the character and scope herein found to be unlawful. Respondent should promptly arrange to cancel or appropriately modify all rates and tariff provisions insofar as they apply to such unlawful operations.

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 13th day of March, A. D. 1956.

No. MC-C-1674

SIMS MOTOR TRANSPORT LINES, INC., REVOCATION OF CERTIFICATE

It appearing, That by order of July 13, 1954, the Commission, division 5, entered upon an investigation on its own motion into the operations of respondent, Sims Motor Transport Lines, Inc., to determine whether it is, or has been engaged in the transportation of commodities not within the scope of its certificate No. MC-18738 dated March 12, 1952, as a common carrier in violation of section 206(a) of the Interstate Commerce Act, and the terms and conditions of said certificate;

It further appearing, That full investigation of the matters and things involved having been made, and division 1, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent, be, and it is hereby, notified and required on or before May 11, 1956, to cease and desist from the performance of any operation, in interstate or foreign commerce, of the scope and character found in said report to be unlawful, and thereafter to abstain from a resumption of any such operation unless and until appropriate authority therefor is obtained.

By the Commission, division 1.

(Seal) Harold D. McCoy,
Secretary.

INTERSTATE COMMERCE COMMISSION

No. MC-C-1674

SIMS MOTOR TRANSPORT LINES, INC., REVOCATION OF CERTIFICATE[1]

Decided July 15, 1957.
(Date of Service Jul 25 1957)

Upon reconsideration, respondent found to be engaged in the transportation of certain commodities made wholly or partly of iron and steel not authorized in its certificate and in violation of the Interstate Commerce Act. Cease and desist order entered. Prior reports 24 M.C.C. 127, 42 M.C.C. 872, 48 M.C.C. 904, and 66 M.C.C. 553.

Harold T. Halfpenny, Richard F. Hahn, and *Howell Ellis* for respondent.

Hugh E. Lille, James Y. Piper, Ellis V. Gregory, and *Nell Guinn* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Claude G. Metzler for interveners.

[1] This report also includes No. MC-18738, Motor Transport Lines Common Carrier Application, No. MC-18738 (Sub-No. 8), Elmer Sims Extension — Chicago, Ill., Commercial Zone, No. MC-2982, Otto Abshier Common Carrier Application, and No. MC-52139, John C. Schiller Common Carrier Application.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By order dated July 13, 1954, the Commission, division 5, on its own motion, instituted an investigation in the title proceeding, pursuant to sections 204(c) and 212(a) of the Interstate Commerce Act, into the practices of Sims Motor Transport Lines, Inc., for the purpose of determining whether it had been and was engaged in the transportation of certain commodities not within the scope of its certificate No. MC-18738, in violation of section 206(a) of the act and of the terms and conditions of said certificate.

In a prior report in that proceeding, 66 M.C.C. 553, decided March 13, 1956, division 1 found that respondent's certificate, insofar as it authorizes the transportation of "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof", does not authorize respondent to transport such finished products as tractors, engines, machinery (new or used, farm or other); agricultural implements, hand or other; metal furniture; or such building products as doors, windows, and screen, or any other similar finished products, and that any such operation under such authority which respondent had been performing or was performing, had been and was in excess of its authority and unlawful. An order was entered requiring respondent to cease and desist from such unlawful operations.

Thereafter respondent filed a petition seeking, alternatively, rehearing or reconsideration on the present record and a stay of the cease and desist order, and this Commission's Bureau of Inquiry and Compliance, hereafter called the Bureau, replied. In its petition respond-

ent contends that division 1 erred in the prior report in the title proceeding, (1) in broadening the issues to include commodities not within the issues as agreed upon, (2) in finding the certificate descriptions "iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof" not patently ambiguous, and in refusing for that reason, to give due consideration to extraneous and antecedent matters in interpreting this certificate, such as (a) evidence of commodities transported by applicant and its predecessors prior to regulation, (b) academic definitions, (c) industry meanings, and (d) years of unchallenged interpretation by respondent, (3) in relying upon the report in *Descriptions in Motor Carriers Certificates*, 61 M.C.C. 209, herein called the *Descriptions* case, and (4) in failing to make findings based on the evidence. In reply, the Bureau concedes that the prior report broadens the issues by covering commodities not contemplated by the parties at the time of hearing, but takes issue with respondent on all other points raised on petition. Upon consideration of the record, of respondent's petition, and of the Bureau's reply thereto, by order of January 7, 1957, we reopened the title proceeding for reconsideration on the present record and postponed the effective date of the cease and desist order until our further order. In order to assist us in determining the sense in which the words were used at the time applicant's authority was granted we also, upon our own motion, reopened the proceedings in Nos. MC-18738, MC-18738 (Sub-No. 8), MC-52139, and MC-2982 for reconsideration along with the title proceeding.

The order instituting the investigation in the title proceeding was general in nature, stating only that it appeared that respondent was transporting from Chicago

and Melrose Park, Ill., to points in Ohio, Kentucky, and Indiana, "certain commodities" not within the scope of its authority. Respondent thereupon filed a motion to make the order more definite and certain, responsive to which, the Bureau entreed into a stipulation with respondent whereby it was agreed between the parties that respondent, during the period July 8, 1953 to April 14, 1954, both inclusive, under the authority above indicated had transported tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery, in interstate commerce, from Chicago or Melrose Park to points in Ohio, Kentucky, and Indiana. At the hearing evidence was adduced by respondent designed to show that it was and is authorized to transport the commodities delineated by the stipulation. Part of such evidence pertained to other commodities respondent had transported and was offered in an effort to demonstrate that respondent had always interpreted its operating authority as including the right to transport finished products fabricated from iron and steel. Some of these other commodities were covered by the findings in the prior report which thereby went beyond the issues as limited by the stipulation. The only issue before us is whether respondent is authorized to transport the commodities covered by the stipulation namely tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery.

Respondent's operating authority is contained in certificate issued in No. MC-18738, dated March 12, 1952. This certificate authorizes the transportation of "iron and steel articles", and "iron and steel products" from, to, and between designated points, over regular routes, and "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof", from, to,

and between named points and points in designated areas, over irregular routes. As pertinent here, it is a consolidation of four previously issued certificates, namely, those in Nos. MC-18738, MC-18738 (Sub-No. 8), MC-2982, and MC-52139, which came about as follows:

On January 13, 1941, a certificate was issued in No. MC-18738 to respondent's predecessor, Elmer Sims, pursuant to an informally processed "grandfather"-clause application. This certificate authorized the transportation, over a specified regular route, of iron and steel products between Chicago, Ill., and South Bend, Ind. On April 13, 1944, in No. MC-2982, as a result of another informally processed "grandfather" clause application, a certificate was issued to Otto Abshier, doing business as Otto Abshier Trucking Co. This certificate authorized the transportation, over irregular routes, of iron and steel products from Chicago to points in Ohio, Kentucky, and Indiana. On May 24, 1943, in No. MC-52139, a certificate was issued to respondent's predecessor, Schiller Trucking Co., Inc., authorizing the transportation over irregular routes, of iron and steel, and articles made thereof, (1) between points in the Chicago commercial zone, on the one hand, and, on the other, points in a described portion of Michigan, and Cleveland and Mansfield, Ohio, and (2) between Detroit, Mich., and Warren and Youngstown, Ohio. On November 2, 1948, in No. MC-18738 (Sub-No. 8), a certificate was issued to respondent's predecessor, Elmer W. Sims, doing business as Motor Transport Lines, pursuant to an application for an extension of operating rights. This certificate authorized the transportation, over irregular routes, of iron and steel articles from points in the Chicago commercial zone to points in Indiana, Ohio, and Kentucky. By virtue of various purchases, approved in proceedings

riet important here, the authority contained in all of these certificates was consolidated and is embraced in the single certificate issued to respondent on March 12, 1952.

The evidence submitted by respondent's predecessor which was the basis for the authority granted in certificate No. MC-18738, dated Jnauary 13, 1941, shows that two shipments of steel were transported by such predecessor from Chicago to South Bend and two shipments of steel tubing from South Bend to Chicago. It was upon proof of these four shipments that this one of respondent's predecessors was granted authority to transport iron and steel products, over a specified regular route, between Chicago and South Bend. At the hearing of the title proceeding herein oral testimony of certain shipper witnesses was submitted to the effect that, in addition to these four shipments, other shipments were transported prior to the "grandfather" date, consisting of all types and kinds of articles made from iron and steel. This evidence was not supported by shipping documents of any kind and was not offered for the purpose of now obtaining any enlarged grant. In his petition for reconsideration respondent emphasizes that it was offered not for the purpose of enlarging the "grandfather" grant but solely for the purpose of showing "the intent of the framers of the certificate descriptions."

The evidence submitted by Otto Absher, which was the basis for certificate No. MC-2982 issued to him on April 13, 1944, discloses that he had transported "iron or steel bars, plates, rods, pipe, and similar iron and steel articles." It was upon this showing only that he was granted authority to transport iron and steel products from Chicago to points in Ohio, Kentucky, and Indiana.

The evidence presented by Schiller Trucking Co., Inc., at the formal hearing on its application and upon which

certificate No. MC-52139, dated May 24, 1943, was predicated, disclose that it had transported steel and steel forgings during the so-called interim period (June 1 to October 15, 1935) when its operation was instituted. It was upon this showing that it was granted authority to transport iron and steel, and articles made thereof, between points in the Chicago commercial zone, on the one hand, and, on the other, points in a described area of Michigan. No "grandfather" rights were involved in this proceeding.

The evidence submitted by respondent's predecessor and which resulted in the issuance to him of certificate No. MC-18738 (Sub-No. 8) on November 2, 1948, disclose that a need existed for his service in the transportation of strip steel, steel springs, bar steel, wire steel rivets, bolts, nuts, plate beam rods, steel rails, beams, sheet steel, and iron and steel, from points in the Chicago commercial zone to points in Indiana, Ohio, and Kentucky. Based upon this evidence he was granted authority to transport iron and steel articles from points in the Chicago commercial zone to points in the named States. No "grandfather" rights were involved in this proceeding and the grant obviously conforms to the proof.

There is nothing of evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that respondent's predecessors were being granted authority to transport tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, or that they then understood they were obtaining such authority. Contrary to the claims of respondent there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended.

Nevertheless, we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding. Nor does the extremely general testimony unsupported by any shipping or other documents, which was submitted at the hearing in the title proceeding, relative to transportation of such commodities by respondent's predecessors prior to and since the statutory date, June 1, 1935, justify a grant now of the commodities here in issue. As above stated this testimony was not offered for any such purpose. In these circumstances, we must look to the language of the certificate in issue here (No. MC-18738) in determining whether respondent is authorized to transport the considered commodities.

The commodity lists formulated in the *Descriptions* case are intended to control the interpretation of certificates issued subsequent to such decision. Although not controlling they also may properly be considered in construing certificates previously issued in prior cases and so doing does not change, modify, or revise the outstanding certificate as respondent contends here.

Concerning the inclusion in the iron and steel articles list (appendix V) of finished manufactured articles made of iron or steel, we said in *Descriptions* case, at pages 245 and 247:

IRON AND STEEL ARTICLES

> The phrase "iron and steel articles" is a commodity description that has been used for years to describe a large group of commodities manufactured from iron and steel on which the carriers applied the same basis of rates, because of similarity of transportation conditions. Although some of the rail and motor carrier tariffs describe the commodities as "articles of iron or steel manufacture," the phrase "iron and steel articles" is understood in transportation circles to mean

list of rough or semifinished articles made from ir
d steel." In *Iron and Steel Articles*, 155 I.C.C. 517
had under consideration the railroad rates on iro
d steel articles within central territory and ap
nded thereto a list of such articles. In *Central
ritory Motor Carrier Rates*, 23 M.C.C. 245, div
on 2, in order to eliminate differences of opinion a
which commodities were included within the d
ription "iron and steel articles" as used in moto
rrier tariffs, approved and set forth therein a li
such commodities. Although the rail list was ap
oved in 1929, and the motor carrier list in 1940
matter called the approved lists, they are for th
st part the same.

The industry proposed list does not include ever
al of iron and steel article, nor is it so intended
me steel companies manufacture steel furnitur
the list does not include that commodity. Neithe
s the list include *iron, crude or pig, and scrap thi
bles and rails in the form of steel.* The proposed li
ludes those commodities which the carriers spe
lizing in the transportation of iron and steel ar
es have been hauling for many years. The ap
oved lists differ from the proposed list in that some
icles are not included if they have "*been manufa
ed or finished beyond a certain point.*" To illustra
industry suggests the term "*rectangular bars*" wit
further limitation, whereas the Commission ap
oved lists restrict annealing pots to those "*in th
ugh*" of "*one advanced in the stage of manufa
e beyond the casting process.*" None of the ar
es in the proposed list has been restricted by
the percentage of nonferrous metals contained
rein. (Italics ours.)

ll be observed that farm machinery is specifically
ed as an article not included in the prescribed ir
el articles list. By the same token, though not dis

l other types of machinery, such as tractors, tractor
s, and used foundry machinery were not included.

have given full consideration to the opinions ex
d by witnesses called by respondent in the title pro
g to the effect that, in their view, the commodities
ue are "iron and steel articles", "iron and steel
ets", or "iron and steel, and products made thereof".
e have considered the academic meanings submitted.
of course, true that, from an academic standpoint a
r, a traction engine, and used foundry machinery
be considered to be iron or steel products if such
odities actually were constructed of iron or steel.
ever, in transportation parlance and, indeed, in com
usage, they are not so considered. As was said in
e *Motor Links, Inc., Interpretation of Certificate*, 52
. 391, at page 392:

"From an academic standpoint, the terms "metal
roducts" and "machinery", although used for want
a better term in a substantial number of certificates
nd permits, are difficult of exact definition. In its
roadest sense, the term "metal products" might be
sed to describe any article made entirely, or princi
ally of metal, such as coins, jewelry, and metal forg
ngs, castings, and stampings, as well as countless
rticles such as typewriters, automobiles, and locomo
ives, each of which articles, in turn, represent assem
blages of many parts, which are themselves metal
roducts. Similarly, the term "machinery" might, in
s broadest sense, include watches, clocks, many elec
rical appliances, pianos, machine guns, automobiles,
ocomotives, and millions of other composite contrap
ions utilizing moving parts. Through common usage,
owever, particularly in transportation parlance, both
f the considered terms have taken on a much more
estrictive meaning, separate and distinct from an
cademic definition of the words utilized, and articles

which might conceivably or technically be considered as "metal products" or "machinery" are not generally comprehended by or even associated with such terms. Thus a watch is not generally associated with either of these terms, although it would probably fall within academic definitions of both. Similarly, machinery is not generally associated with the term "metal products" and was made the subject of specific authorization herein, although most machinery would fall within a broad definition of "metal products", since most machinery is made of metal.

Compare *Pierce Auto Freight Lines, Inc., v. Converse*, 54 M.C.C. 447, *Roofing Paper, Portland, Oreg., to Washington Points*, 33 M.C.C. 340, *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695, *Jones Extension—Machinery and Pipe*, 52 M.C.C. 29, and *Black v. Interstate Commerce Commission*, 167 Fed. (2d) 825, 335 U.S. 818. It is also significant that certificate No. MC-18738, dated January 13, 1941, issued to respondent's predecessor, authorized the transportation of iron and steel products and refrigeration equipment between Chicago and South Bend. Certainly, if respondent's interpretation of "iron and steel products" were sound, the additional authorization of "refrigeration equipment", obviously made principally of iron or steel, would have been unnecessary surplusage, and would not have been included. Thus, on its face this certificate negatives respondent's interpretation.

We have no hesitancy in finding that respondent's certificate, insofar as it authorizes the transportation of "iron and steel articles", and "iron and steel products", and "iron and steel, and articles made thereof", does not authorize respondent to transport tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery. Respondent's contention to the contrary is supported neither from an interpretative

standpoint nor by the evidence submitted in support of the grants of authority to its predecessors.

Upon reconsideration of the record in Nos. MC-18738, 18738 (Sub-No. 8), 2982, and 52139 and upon consideration of the record in No. MC-C-1674, we find that the certificate presently-held by applicant-respondent, insofar as it authorizes the transportation of "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof", does not authorize respondent to engage in the transportation as a common carrier by motor vehicle, in interstate or foreign commerce, of tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery; that collectively the records in all of the considered proceedings do not justify any enlargement or change in either the scope or the form of the authority heretofore granted to applicant-respondent as set forth in said certificate; and that any past or present transportation by applicant-respondent under its presently-held authority as above set forth, of tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, has been and is in excess of applicant-respondent authority and unlawful.

An appropriate order will be entered requiring respondent to cease and desist from all operations in interstate or foreign commerce, of the character and scope herein found to be unlawful. Respondent should promptly arrange to cancel or appropriately modify all rates and tariff provisions insofar as they apply to such unlawful operations.

Commissioner Arpaia, being necessarily absent, did not participate in the disposition of these proceedings.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of July A. D. 1957

No. MC-C-1674

SIMS MOTOR TRANSPORT LINES, INC.,
REVOCATION OF CERTIFICATE

No. MC-18738

MOTOR TRANSPORT LINES COMMON CARRIER
APPLICATION

No. MC-18738 (Sub-No. 8)

ELMER W. SIMS EXTENSION—
CHICAGO, ILL., COMMERCIAL ZONE

No. MC-2982

OTTO ABSHIER COMMON CARRIER APPLICATION

No. MC-52139

JOHN C. SCHILLER COMMON CARRIER
APPLICATION

These proceedings having been duly submitted, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondent in No. MC-C-1674, Sims Motor Transport Lines, Inc., of Riversdale, Ill., be, and it is hereby, notified and required to cease and desist, on or before September 3, 1957, and thereafter to abstain and refrain, from all operation, in interstate or foreign commerce, of the character and scope found in said report on reconsideration to be unlawful and unauthorized.

By the Commission.

(Seal) Harold D. McCoy
Secretary

INTERSTATE COMMERCE COMMISSION

No. MC-C-1674[1]

SIMS MOTOR TRANSPORT LINES, INC., REVOCATION OF CERTIFICATE

Decided May 27, 1958.
(Date of Service—Jun 11 1958)

Upon further reconsideration, findings in prior report, 72 M.C.C. 355, affirmed, after considering the applicability and effect of certain decisions of the Commission relating to "iron and steel products and articles". Respondent found to be engaged in the transportation of certain commodities made wholly or partly of iron and steel not authorized by its certificate and in violation of the Interstate Commerce Act. Cease and desist order entered.

Appearance as shown in prior report.

[1] This report also includes No. MC-18738 Motor Transport Lines Common Carrier Application; No. MC-18738 (Sub-No. 8), Elmer W. Sims Extension—Chicago, Ill., Commercial Zone; No. MC-2982, Otto Abshier Common Carrier Application; and No. MC-52139, John C. Schiller Common Carrier Application.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION

By the Commission:

By order dated July 13, 1954, the Commission, division 5, on its own motion, instituted an investigation in the title proceeding, pursuant to sections 204(c) and 212(a) of the Interstate Commerce Act, into the practices of Sims Motor Transport Lines, Inc., hereinafter called respondent, for the purpose of determining whether it had been and was engaged in the transportation of certain commodities not within the scope of its certificate No. MC-18738, dated March 12, 1952, in violation of section 206(a) of the act and of the terms and conditions of such certificate.

In the initial report in the title proceeding, 66 M.C.C. 553, decided March 13, 1956, division 1 found that respondent's certificate, insofar as it authorizes the transportation of "iron and steel articles", "iron and steel products" and "iron and steel, and articles made thereof", did not authorize respondent to transport such finished products as tractors, engines, and machinery (new or used, farm or other); agricultural implements, hand or other; metal furniture; or such building products as doors, windows, screens, or any other similar finished products, and that any such operation which respondent had been, or was performing under such authority, had been and was in excess of its authority and unlawful. An order was entered requiring respondent to cease and desist from such unlawful operations.

Upon consideration of a petition filed by respondent and a reply by our Bureau of Inquiry and Compliance, hereinafter called the Bureau, by order of January 7, 1957, we reopened the title proceeding for reconsideration

on the present record, postponed the effective date of the above-mentioned cease and desist order until our further order, and, on our own motion, reopened the four basic application proceedings in eNs. MC-2982, MC-52139, MC-18738, and MC-18738 (Sub-No. 8), from which the authority in respondent's existing certificate No. MC-18738 dated March 12, 1952, is derived, for reconsideration with the title proceeding in order to assist us in determining the sense in which the above-described terms were used at the time respondent's authority was granted.

In our report on reconsideration in the above proceedings, 72 M.C.C. 355, decided July 15, 1957, we modified the prior findings of division 1 in the title proceeding to some extent, and found that respondent's certificate, insofar as it authorizes the transportation of the iron and steel commodities hereinbefore described, did not authorize the transportation of tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery; that collectively the records in all of the considered proceedings did not justify any enlargement or change either in the scope or the form of the authority presently set forth in respondent's certificate No. MC-18738, dated March 12, 1952; and that any past or present transportation by respondent under such existing authority, of tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, was in excess of its authority and unlawful. We, accordingly, entered an order requiring respondent to cease and desist from such unlawful operations, on or before September 3, 1957.

Thereafter respondent filed a suit on August 13, 1957, in the United States District Court for the Northern District of Illinois, Eastern Division, requesting the court

to review our decision herein, and seeking a temporary restraining order against us with respect to our cease and desist order of July 15, 1957. It also filed on August 26, 1957 a further petition for reconsideration, seeking a reversal of our prior decision, a finding that the operations conducted by it have been lawful and authorized, and a stay or modification of the effective date of our cease and desist order. Upon consideration thereof, and of the Bureau's reply, and of the records in the considered proceedings, by order of December 6, 1957, we reopened such proceedings for reconsideration on the present records therein solely for the purpose of considering the applicability and effect of certain of our decisions relating to "iron and steel products and articles", and denied the petition in all other respects. By orders of August 31, 1957, and November 4, 1957, we postponed the effective date of our cease and desist order of July 15, 1957, from September 3, 1957 to November 4, 1957, and from the latter date until our further order, respectively. Respondent's court case presently is being held in abeyance pending our further decision herein.

Respondent argues on petition that we have failed in our last prior report to follow our past decisions defining the terms "products" and "iron and steel articles". It urges that we heretofore have always made a distinction between a commodity and the products thereof, citing, among other cases, *Hulmes Extension of Operations—Indiana*, 48 M.C.C. 455, wherein division 5 (now division 1) found that the term "wire products" described commodities of a definite type or class, namely, articles made principally out of wire, and that a carrier holding authority to transport "wire products" was not authorized to transport "wire." Respondent contends in this connection that the commodities which it transported, and

which are in issue in the title proceeding, were manufactured wholly or principally from iron and steel; and that therefore, they would have to be either "articles" or "products" made from iron and steel and should fall within the general class of iron and steel articles or products which it is authorized to transport. It also directs attention to *Deaton Truck Lines, Inc., Common Carrier Application*, 43 M.C.C. 585, in which we found that the authority to transport "iron and steel articles" included the right to transport knocked-down steel houses which were manufactured wholly or principally from iron and steel, but pointed out that such authority should not be construed as authorizing the transportation of knocked-down steel houses *or any other articles* that were manufactured principally from materials other than *iron and steel*. Respondent argues upon the basis of such language that it should be able under its present authority, to transport any articles made principally from iron and steel. It also relies on *McCullough Transfer Co. Common Carrier Application*, 54 M.C.C. 241, in which division 5, citing the *Deaton* case as authority, stated that authority to transport "steel articles" embraces any item manufactured wholly or principally from steel. Respondent urges, therefore, that we should find that it is authorized under the generic commodity descriptions in its certificate to transport any article which is made wholly or principally from iron and steel. The Bureau contends in reply that the cases cited by respondent deal with iron and steel articles of an entirely different character than those being considered here, and that the findings in our prior report are correct in all respects, should be affirmed.

The underlying facts are adequately set forth in the prior reports, and will not be restated here, except where necessary for clarity of discussion. However, we see no

need to restate here any of the evidence adduced in the basic application proceedings, which was set forth in our prior report, since it is clear that the evidence of record in those proceedings does not warrant a grant of authority to respondent to transport any of the specific commodities which were found in our prior report to be beyond the scope of its existing authority.

As previously indicated, respondent for some time has held authority as here pertinent, to transport iron and steel commodities hereinbefore described from and to specified points in several States. It was stipulated, subsequent to the issuance of the order of investigation in the title proceeding, that respondent held such authority, and that it had transported thereunder during the period from July 8, 1953, to April 14, 1954, inclusive, tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery from Chicago and Melrose Park, Ill., to certain points in Indiana, Kentucky, and Ohio. The issue here is whether respondent has authority to transport the above-named commodities under its existing certificate.

As previously stated, we reopened the instant proceedings solely for the purpose of considering the applicability and effect of certain decisions of this Commission relating to "iron and steel products and articles". Our principal reason therefor is that respondent has misinterpreted certain language used in two prior decisions and we consider the matter to be of sufficient importance in this instance to warrant our discussion thereof in a report. However, before so doing, we shall consider first respondent's contention that we have not followed our own definition of the term "products". Respondent points out that the dictionary definition of "products" is any thing

produced; that, in effect, we have followed that definition; and that we have always distinguished between a commodity and the products made therefrom. While it is true that we have, both in granting and interpreting operating authorities, distinguished between the commodity itself and products, articles, or derivatives made therefrom, *Humes* case, *supra*, 48 M.C.C., at 457; *P. Saldutti & Sons, Inc., Interpretation of Permit*, 63 M.C.C. 593, 594; and *Cullum Ext.—Ohio*, 67 M.C.C. 5, 8, and 68 M.C.C. 451, 454, we have not strictly followed academic or technical meanings where the term "products" has appeared in commodity descriptions due to the fact that certain terms used in connection therewith have, in transportation parlance, taken on a more restrictive meaning. Compare *Weldon-Investigation of Operations*, 69 M.C.C. 796, 798. As we pointed out in our prior report, the following was stated in *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, at page 392:

> From an academic standpoint, the terms "metal products" and "machinery", although used for want of a better term in a substantial number of certificates and permits, are difficult of exact definition. *In its broadest sense, the term "metal products" might be used to describe any article made entirely, or principally of metal, such as coins, jewelry, and metal forgings, castings, and stampings, as well as countless articles such as typewriters, automobiles, and locomotives, each of which articles, in turn, represent assemblages of many parts which are themselves metal products.* Similarly, the term "machinery" might, in its broadest sense, include watches, clocks, many electrical appliances, pianos, machine guns, automobiles, locomotives, and millions of other composite contraptions utilizing moving parts. *Through common usage, however, particularly in transportation parlance, both of the considered terms have taken on a much more restrictive meaning.*

separate and distinct from an academic definition of the words utilized, and articles which might conceivably or technically be considered as "metal products" or "machinery" are not generally comprehended by or even associated with such terms. (Emphasis supplied)

It is apparent therefore, that the term "products" in respondent's certificate cannot be interpreted separately but must be considered together with the other language used in that particular description.

Respondent's certificate contains, as here pertinent, the three following generic commodity descriptions: "Iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof". Since the terms "iron and steel articles" and "iron and steel products" are synonymous (see original report in this proceeding, 66 M.C.C. 553, at 555-556, and *Kulp & Gordon, Inc., Interpretation of Certificate*, 72 M.C.C. 423, 424), it would necessarily follow that respondent is authorized to transport only two classes or categories of items, namely, (1) iron and steel, and (2) iron and steel articles (or products). The term "iron and steel" has been used in operating authorities for a number of years to authorize the transportation of such items as pigs, ingots, blooms, slabs, and billets, each of which requires further processing. Compare *Humes* case, *supra*, 63 M.C.C., at 457; *Saldutti* case, *supra*, 63 M.C.C. at 594-595; and *Atlanta*, 69 M.C.C. 257, 259. In contrast the considered commodities which respondent has been transporting are fully manufactured and assembled items which do not require further processing, and clearly can not be considered as falling within the description "iron and steel" as consistently used in operating authorities. Compare *Clark Transport Co. Ext.-Farm Tractors*, 62 M.C.C. 555, 564;

Knight-Revocation of Certificate, 63 M.C.C. 643, 648; *Ohio Northern Truck Line, Inc., Investigation* 67 M.C.C. 629, 631; *Transportation Activities of Owenton Motor Express*, 69 M.C.C. 536, 538; *Dallas, & Mavis Fwdg. Co., Inc., Ext., Charabusco, Ind.*, 71 M.C.C. 553, 555. The remaining question is whether such commodities may properly be considered as being included within respondent's "iron and steel articles" authority. This latter term is understood in transportation parlance to include rough or semifinished articles (or products) made from iron and steel. See *Atlanta-New Orleans* case, *supra*, 69 M.C.C. at 260. Such items as nails, bolts, castings, manhole covers, pipe, and forgings are considered to be within that grouping. Also considered to be included, and presently set forth in the list of "iron and steel articles" in appendix V to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, are a number of building material items such as lathing and ribbing, structural flooring, wall tires, studding, joints, sheets, channels, and roofing. As can be readily seen, none of these are complex items, such as a piece of machinery made from an assemblage of many different items nor do they approach the character of a finished replacement part or tool such as is used in the repair and maintenance of tractors or engines.

In the *Deaton* case cited, by respondent, we had determined, on the basis of evidence showing a need for the transportation of cast iron pipe and related articles, wrought iron pipe, and structural steel, that the applicant therein should be granted authority to transport iron and steel articles. We further considered the question as to whether applicant there should also be authorized to transport knocked-down steel houses. In so doing in 43 M.C.C. 585, at page 592, we stated, in part, as follows:

> Applicant's petition does not disclose whether the knocked-down steel houses which it desires to transport are manufactured wholly or principally from iron and steel or whether, as seems likely, they also contain other materials. In our opinion, knocked-down steel houses manufactured wholly or principally from iron and steel may be included within the general class of iron and steel articles which we shall authorize applicant to transport. The authority hereinafter granted to transport iron and steel articles, however, should not be construed as authorizing the transportation of knocked-down steel houses *or any other articles* which are manufactured principally from materials other than iron and steel. (Emphasis supplied).

It was clearly not our intention there, as respondent contends, to give a broad and all-inclusive meaning to the term "iron and steel articles", and thereby radically change the known and accepted meaning of that term. In the first place, we were considering only whether one additional commodity, namely, knocked-down steel houses, should be included within that term. Secondly, that particular commodity was not a complex steel item and was not being transported assembled, as are the tractors and traction engines involved here. We stated in the *Deaton* case that the "iron and steel articles" authority therein granted should not be construed as authorizing the transportation of knocked-down steel houses or any other articles which are manufactured principally from materials other than iron and steel. Neither should such statement be construed as authorizing the transportation under such "iron and steel articles" authority of everything made wholly or principally from iron and steel. On the contrary it was solely an expression of the view that in the first instance an article would have to be made wholly or principally from iron and steel before it could even be considered to be included within the general class of

iron and steel articles. However, it was not necessary for us in deciding the issues in the *Deaton* case, considering the commodities involved, to point out that complex mechanical assemblages and devices, or finished tools and parts therefor were not considered to be included within the term "iron and steel articles". Nor was it necessary for division 5, in deciding the issues in the *McCullough* case, in which the petitioner-carrier therein sought to have its "steel-mill products" authority amended to "iron and steel, and iron and steel articles", to consider whether such mechanical assemblages and devices, or finished tools and parts therefor would be included in the term "steel articles" since none were directly in issue therein. It is apparent, therefore, that neither we nor division 5 intended in those proceedings to broaden the meaning of the term "iron and steel articles" to include such items as complex mechanical assemblages and devices and related items. Those decisions do not support respondent's broad interpretation of the language here involved. Any color of support which they contain is lost when they are read in the light of the issues there involved.

Respondent interprets the terms "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof" in its certificate to authorize the transportation of, and admittedly has engaged in the transportation of, tractors, traction engines, tools and parts for such tractors and traction engines, and used foundry machinery. However, it is obvious for the reason hereinbefore stated that the latter commodities were never intended and are not considered to be included in the above-described commodity descriptions in respondent's certificate. Nor did we intend, as respondent maintains, to broaden the "iron and steel articles" category to include many other commodities, such, for example, as

machinery or complex mechanical devices, which have never been considered to be in such category. If we were to give the broad and all-inclusive meaning to the "iron and steel articles" category, as here proposed by respondent, it then could be easily expanded to include many other articles, such as the typewriters, automobiles, and locomotives referred to in the above-mentioned *Eclipse* case, and thus respondent would be able to invade the fields of, and to compete with, numerous other carriers without making the required showing of public need for its service. A broad interpretation of this type is not warranted. Compare *Black* v. *Interstate Commerce Commission*, 167 Fed. (2d) 825, Cert. den., 335 U.S. 818; *Knight* case, *supra*, 63 M.C.C. at 648; and *Weldon* case, *supra*, 69 M.C.C. at 798.

Upon further reconsideration, we find that the certificate presently held by respondent, insofar as it authorizes the transportation of "iron and steel articles", "iron and steel products", and "iron and steel, and articles made thereof" does not authorize respondent to engage in the transportation as a common carrier by motor vehicle, in interstate or foreign commerce, of tractors, traction engines, tools and parts for such tractors, and traction engines, or used foundry machinery; that any past or present transportation by respondent under its above-described authority of tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery has been and is in excess of respondent's authority and unlawful.

An appropriate order will be entered requiring respondent to cease and desist from all operations, in interstate or foreign commerce, of the character and scope herein found to be unlawful. Respondent should promptly ar-

range to cancel or appropriately modify all rates and tariff provisions insofar as they apply to such unlawful operations.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of May, A. D. 1958.

No. MC-C-1674

SIMS MOTOR TRANSPORT LINES, INC.,
REVOCATION OF CERTIFICATE

No. MC-18738

MOTOR TRANSPORT LINES COMMON CARRIER
APPLICATION

No. MC 18738 (Sub-No. 8)

ELMER W. SIMS EXTENSION—
CHICAGO, ILL., COMMERCIAL ZONE

No. MC-2982

OTTO ABSHIER COMMON CARRIER APPLICATION

No. MC-52139

JOHN C. SCHILLER COMMON CARRIER
APPLICATION

These proceedings having been duly submitted, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further reconsideration herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the order entered in these proceedings on July 15, 1957, the effective date of which by our order of November 4, 1957 postponed indefinitely the pending further order of this Commission, be and it is

hereby reinstated and respondent in No. MC-C-1674, Sims Motor Transport Lines, Inc., of Riverdale, Ill., be, and it is hereby, notified and required on or before the compliance date hereinafter set forth, to cease and desist and thereafter to abstain and refrain from all operations, in interstate or foreign commerce, of the character and scope found in the said report on further reconsideration to be unlawful and unauthorized.

And it is further ordered, That the statutory compliance date, after [illegible] failure to be in compliance with the above may [illegible] to an order of revocation, be, and it is hereby, fixed as July 17, 1958.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—No. 57 C 1377)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DUFFY, *Circuit Judge*, CAMPBELL and LA BUY, *District Judges*.

This action is brought and the jurisdiction of this Court is invoked under the provisions of Title 49 U.S.C. Section 305 (g), Title 5 U.S.C. Section 1009 and Title 28 U.S.C. Sections 2321 through 2323 inclusive, to set aside and annul orders of defendant Interstate Commerce Commission in Docket No. MC-C-1674, *Sims M. Transport Lines, Inc., Revocation of Certificate*, 66 M.C.C. 553 (1956) 72 M.C.C. 355 (1957), and 76 M.C.C. 467, (1958). In the

administrative proceedings, the Commission determined that plaintiff's existing authority to transport "iron and steel articles", "iron and steel products", and "iron and steel, and articles made therefrom", does not authorize the transportation of "tractors, traction engines, tools and parts for tractors, and traction engines, and used foundry machinery". The petition for leave to intervene has heretofore been granted. Title 28 U.S.C. Section 2323; Title 28 U.S.C. Rule 24.

The Commission, on its own motion, by an order dated July 13, 1954, commenced an investigation proceeding in its Docket No. MC-C-1674, to determine whether Sims was transporting commodities not authorized by its certificate of public convenience and necessity which had been issued on March 12, 1952, in Docket No. MC-18738. This certificate is, in effect, a consolidation of four previously issued certificates. The history of these proceedings is described in the Commission's 1957 report (72 M.C.C. 355, 357-358):

> On January 13, 1941, a certificate was issued in No. MC-18738 to respondent's predecessor, Elmer Sims, pursuant to an informally processed "grandfather" clause application. This certificate authorized the transportation, over a specified regular route, of iron and steel products between Chicago, Ill., and South Bend, Ind. On April 13, 1944, in No. MC-2982, as a result of another informally processed "grandfather" clause application, a certificate was issued to Otto Abshier, doing business as Otto Abshier Trucking Co. This certificate authorized the transportation, over irregular routes, of iron and steel products from Chicago to points in Ohio, Kentucky, and Indiana. On May 24, 1943, in No. MC-52139, a certificate was issued to respondent's predecessor, Schiller Trucking Co., Inc., authorizing the transportation over irregular routes, of iron and steel, and articles made thereof, (1) between points in the Chicago commercial

zone, on the one hand, and, on the other, points in a described portion of Michigan, and Cleveland and Mansfield, Ohio, and (2) between Detroit, Mich., and Warren and Youngstown, Ohio. On November 2, 1948, in No. MC-18738 (Sub-No. 8), a certificate was issued to respondent's predecessor, Elmer W. Sims, doing business as Motor Transport Lines, pursuant to an application for an extension of operating rights. This certificate authorized the transportation, over irregular routes, of iron and steel articles from points in the Chicago commercial zone to points in Indiana, Ohio, and Kentucky. By virtue of various purchases, approved in proceedings not important here, the authority contained in all of these certificates was consolidated and is embraced in the single certificate issued to respondent on March 12, 1952.

The matter was referred to an examiner of the Commission for a formal hearing. Plaintiff was represented by counsel in the hearing, and it introduced evidence, cross-examined witnesses, and filed formal pleadings. The Commission's Bureau of Inquiry and Compliance participated in the proceeding, and its counsel also introduced evidence, cross-examined witnesses, and filed pleadings. After the examiner issued his recommended report and order, Sims filed exceptions and the Bureau replied, which were considered by Division 1 of the Commission. On March 13, 1956, Division 1, acting for the Commission, issued its report (66 M.C.C. 553) in which it found that certain commodities had been transported by Sims beyond the scope of its certificate, and it ordered Sims to cease and desist from such carriage on or before May 11, 1956. On reconsideration, the entire Commission considered Sims' petition, the reply of the Bureau, and it also, upon its own motion, reopened the four dockets described in the 1957 report (72 M.C.C. at pp. 357-358), in order to have available all possible information to determine the

sense in which the commodities in question were used at the time of the various grants. On July 15, 1957, in its report on reconsideration (72 M.C.C. 355), the Commission found that nothing in Sims' operating authority authorized transportation of tractors, traction engines, tools, and parts therefore, or used foundry machinery. Accordingly, it ordered Sims to cease and desist from such carriage of these goods from and after September 3, 1957. Thereafter, on August 13, 1957, plaintiff filed its complaint before this Court, seeking a temporary injunction against enforcement of the Commission order, and seeking to set it aside by a permanent injunction. On August 26, 1957, however, Sims petitioned the Commission again to reconsider its decision, and the Court, by order dated October 14, 1957, ordered this action held in abeyance until the Commission should finally dispose of the second petition for reconsideration. On May 27, 1958, the Commission issued its second report on reconsideration (76 M.C.C. 467), in which it again ordered Sims to cease and desist from the questioned transportation on or before July 17, 1958. After Sims amended its complaint to attack the second order on reconsideration, the Commission, by order dated July 7, 1958, postponed the effective date of the cease and desist order until further order of the Commission.

The basic issue before the Court, as it was before the Commission, is a simple one: Namely, does the plaintiff have the right to transport tractors, parts of tractors and used foundry machinery from Chicago and Melrose Park to Ohio, Kentucky and Indiana under a certificate which authorizes the transportation of "iron and steel products", "iron and steel articles", and "iron and steel, and articles made thereof"? The scope of judicial review to which plaintiff is here entitled has been determined by the

Supreme Court of the United States. In *Nelson Inc.*, v. *United States*, 355 U.S. 554, it is stated:

> "In ascertaining [the meaning of words used in operating authority issued by the Commission], we are not given *carte blanche*; just as [t]he precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commision, *Noble* v. *United States*, 319 U.S. 88, 93 (1943), subsequent construction of the grandfather permit by the Commission is controlling on the courts unless clearly erroneous."

In footnote 4 of that same opinion, pages 558, 559, it is stated:

> "It is true, of course, that limitations on Commission power to modify motor carrier permits, established in Section 212 (a) of the Act, cannot be bypassed under a guise of interpretative action. Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous."

Plaintiff, in urging that the orders of defendant Commission be set aside and annulled, makes the following arguments:

(1) The Commission erred in

(a) Reopening proceedings without assigning such matters for further hearing or permitting the filing of briefs.

(b) In its resume of its reopening proceedings.

(2) The Commission erred in relying upon "iron and steel articles" list as set forth in the Descriptions case.

(3) The report erroneously deems the commodity description "iron and steel products", "iron and steel and articles made thereof" to be so patently unambiguous as to preclude all inquiry into the intent of the framers of the certificate descriptions.

(4) The Commission erred in limiting the commodities to be transported to correspond precisely with those specifically mentioned in other proceedings.

(5) The Commission erred in failing to give due consideration to the interpretation as given by the industry.

(6) The Commission erred in failing to follow in the disposition of this case its own definition of "products".

(7) (a) Plaintiff has engaged in the questioned transportation for twenty-five years.

(b) Plaintiff purchased certain operating rights with the approval of the Commission.

We now consider plaintiff's first argument, subsections (a) and (b), which apparently attacks the procedure of the Commission. Specifically, plaintiff appears to contend that the Commission's action is contrary to Title 49 U.S.C. Section 312 (a); that the Commission examined the four basic proceedings upon which plaintiff's presently held certificate is based without proper hearing; that the findings of the Commission based upon this examination are erroneous; and finally, that these erroneous findings were persuasive to the Commission's final opinion.

The short answer to plaintiff's first contention is that the orders plaintiff asks us to set aside take no rights from it, but merely interpret what rights it had from the beginning. It is apparent from the record that defendant Commission has not sought to diminish or modify, under the guise of interpretative action, or otherwise,

the operating authority of plaintiff, but has rather endeavored to provide a reasonable and fair construction of the same. Since we are here concerned with the review of an interpretation proceeding, neither Section 312 (a), nor *Watson Bros. Transportation Co. v. United States*, 132 F.Supp. 905 are applicable. *Jones Truck Lines v. United States*, 146 F.Supp. 697, 703. In regard to plaintiff's contention that the Commission had no right to examine the proceedings behind the certificate without proper hearing, the following statement of the Supreme Court in the *Nelson* case, *supra*, at page 558, footnote 3 is of particular interest:

> "Absent patent ambiguity, it is well established that the Commission will not refer to the underlying grandfather operation . . . Even if reference is made here, however, . . . [t]hat background in nowise supports appellant's position here . . ."

In other words, the Supreme Court does not appear to preclude the possibility of going behind a certificate, even though it is not considered patently ambiguous which is exactly the case here. The Commission in its 1957 report, 72 M.C.C. 355, at page 359, makes the following statement:

> "Contrary to the claims of respondent, there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended. Nevertheless we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding."

We conclude that the Commission's decision as to the meaning of the certificate is reached independently by

interpretation of the certificate at face value, while the treatment accorded underlying background more or less approximates the holding in the *Nelson* case. Plaintiff's attempt to discredit the Commission's evaluation of underlying background by reference to certain portions of the four basic proceedings re-examined by the Commission must fail in that the out-of-context fragments selected by plaintiff are, for the most part, misleading, and, in no way affect the evaluation of the entire record. It follows that the contentions of plaintiff in regard to the examination of underlying background by the Commission are without merit.

We now consider plaintiff's second argument.

In *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, the Commision established commodity lists under class or generic headings specifying the commodities to be transported thereunder which were to be used in describing the commodity scope of certificates to be issued to motor carriers of property in the future. While it was expressly stated that such commodity lists would be binding only on future certificates, it is axiomatic that the definitions of commodity descriptions established by the Commission were based upon the general understanding of these terms within the motor carrier industry. One of the generic classifications dealt with by the Commission in the *Descriptions* case was "iron and steel articles". The Commission, after extensive hearings participated in by numerous motor carriers and interested parties, expressly found at Page 245, that "the phrase 'iron and steel articles' is understood in transportation circles to mean a list of rough or semifinished articles made from iron and steel". It is true that this generic classification has been interpreted to embrace certain simple, finished products

of uncomplicated design, such as wire garment hangers, or knocked-down steel houses. *Atlanta-New Orleans Motor Freight Co. v. Eagle Motor Lines, Inc.*, 69 M.C.C. 257; *Deaton Truck Lines, Inc., Common Carrier Application*, 43 M.C.C. 585. However, it is clear from the *Descriptions* case and subsequent proceedings that tractors, traction engines and foundry machinery are much too complicated to be included in the generic classification, "iron and steel articles".

As pointed out by the Commission in the 1957 report, 72 M.C.C. 355, at page 359: "Although not controlling they (commodity lists in the Descriptions case) also may properly be considered in construing certificates previously issued in prior cases . . ." The Commission did not rely on the *Descriptions* case as being determinative, but rather noted it as one of several factors for proper consideration. We find no error in the Commission's consideration of the *Descriptions* case.

As to plaintiff's third argument, it is clear from the record, from transportation parlance and from various cited cases that there is nothing patently ambiguous in plaintiff's certificate.

As to plaintiff's fourth argument, this contention has been dealt with in regard the first argument where we held that the treatment of underlying background here approximates the consideration given underlying background in the *Nelson* case, *supra*. As such, there is no error.

We now consider plaintiff's fifth argument.

There is little merit to plaintiff's claim that the testimony of its supporting witnesses was ignored since the Commission in its 1957 report, 72 M.C.C. 355, 360, states that it has "given full consideration" to that testimony.

The weight to be accorded that testimony is an exclusive function of the Commission, so long as it does not act arbitrarily, capricously or in clear error. *Loving* v. *United States*, 32 F.Supp. 464, 467. It is only logical that the Commission, which is appointed by law and informed by experience to interpret the certificate issued by it, should be free to draw upon its own accumulative experience in reaching a decision. *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 349. The scope of the Commission's examination in this cause, as indicated by the record, is exhaustive as to the industry and when considered in the light of the testimony of plaintiff's witnesses, we hold that the action of the Commission was not arbitrary, capricious or clearly erroneous.

In regard to plaintiff's sixth contention, the Supreme Court of the United States in *Virginian Ry.* v. *United States*, 272 U.S. 658 stated at pages 665, 666 that:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Furthermore, we find that the proceedings cited by plaintiff such as the *Deaton Truck Lines* case, *supra*, discussed in relation to plaintiff's second argument, are consistent with the Commission's interpretation of plaintiff's certificate. 1958 Report, 76 M.C.C. 467, 472, 473.

We now consider plaintiff's seventh argument, subsections (a) and (b).

It is well established law that plaintiff may not raise the doctrines of estoppel or laches against the United States. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-227; *United States* v. *Summerlin*, 310 U.S. 414, 416. Nor can plaintiff assert that his transportation

of the items in question over a period of years renders such transportation legal today. *Nelson* v. *United States, supra.* Obviously then, if at all, plaintiff's argument must bear upon the intention of the Commission in issuing the specific grants of authority here in question. It is agreed that plaintiff did transport the items in question prior to 1935. However, the record indicates that such shipments were in some cases not only isolated and infrequent, but they also differed in geographical location from the specific grants of authority in question here. The Commission in its 1957 report, 72 M.C.C. 355, having re-examined all the evidence offered in the four basic proceedings, presents a detailed summary of that record and then concludes at page 359:

> "There is nothing of evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that respondent's predecessors were being granted authority to transport tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, or that they were obtaining such authority."

In any event, if plaintiff believes that the scope of his certificate is too restrictive when considered against its background, his remedy is to petition the Commission to reopen the grandfather proceedings. *Nelson* v. *United States, supra,* at pages 561, 562. This proceeding is concerned only with the interpretation of the certificate as it now exists.

We conclude that the terms, "iron and steel articles", "iron and steel products" and "iron and steel, and articles made thereof" have been narrowly construed within the steel and transportation industry. They have never com-

prehended finished products of any degree of complexity or manufacture. 1958 Report, 76 M.C.C. 467, 471-472. Their meaning has historically related to and embraced the rough and semifinished articles of iron and steel produced by the steel industry. We find that the Commission's unanimous determination that tractors and foundry machinery are not iron and steel articles or products, is not arbitrary, capricious or clearly erroneous, but is, on the contrary, wholly reasonable.

The orders of the Interstate Commerce Commission are affirmed.

The complaint is dismissed.

/s/ F. Ryan Duffy
/s/ William J. Campbell
/s/ Walter J. LaBuy

Dated: November 30th, 1959

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JAMES R. BROWNING, Clerk

No. 823

In the Supreme Court of the United States

OCTOBER TERM, 1959

SIMS MOTOR TRANSPORT LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
RICHARD A. SOLOMON,
HENRY GELLER,
Attorneys,
Department of Justice, Washington 25, D.C.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

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547584—60

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 823

SIMS MOTOR TRANSPORT LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered on November 30, 1959, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellants' complaint, which sought to set aside an order of the Interstate Commerce Commission directing appellant to cease and desist from conducting certain motor carrier operations found to be unauthorized by its common carrier certificate.

QUESTION PRESENTED

Whether the Interstate Commerce Commission properly construed the motor carrier certificate held by appellant in determining that authority to transport "iron and steel articles" does not cover the transportation of "tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery."

STATEMENT

This case involves the construction of a motor common carrier certificate issued to appellant in 1952, authorizing it to transport iron and steel articles or products [1] between specified points (App. 16a).[2] This certificate is a consolidation of a certificate issued to appellant's predecessor in 1941, extended in 1948, authorizing transportation of "iron and steel products" (*ibid.*) and certificates purchased by appellant, with Commission approval, in 1945 and 1948, authorizing transportation of "iron and steel products" and "iron and steel, and articles made thereof," respectively (*ibid.*).

In 1954, the Commission instituted an investigation to determine whether appellant was transporting commodities not authorized by its certificate. After full administrative proceedings, the Commission (Division 1) held that appellant had conducted unauthorized

[1] Specifically, the certificate authorizes the transportation of "iron and steel products," "iron and steel articles," and "iron and steel, and articles made thereof" (Pet. App. 41a).

[2] We use the designation "App" to refer to the Appendix to the Jurisdictional Statement.

operations (66 M.C.C. 553), and issued a cease and desist order. The Commission, after finding no "patent ambiguity" in appellant's certificate (App. 6a), ruled (App. 9a–10a) that "finished products of manufacture," such as tractors, traction engines and used foundry machinery, cannot be considered to be "iron and steel articles, as that term is used in motor carrier operating authorities even though they may be manufactured principally of iron and steel."

Upon reconsideration, the Commission, in addition to modifying its order with respect to certain commodities not pertinent here, reopened this and the four prior proceedings in which the predecessor certificates had been issued (*supra*, p. 2), "in order to assist [it] in determining the sense in which the words were used at the time applicant's authority was granted * * *" (App. 14a). After consideration of the evidence in these "basic proceedings," the Commission reaffirmed its earlier determination in a decision (72 M.C.C. 355), stating (App. 18a–19a):

> * * * Contrary to the claims of respondent there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended. Nevertheless, we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding * * *.

Appellant again petitioned for reconsideration, claiming, *inter alia*, that the decision was inconsistent

with prior pertinent Commission decisions. On May 27, 1958, the Commission issued its second report on reconsideration (76 M.C.C. 467), in which it analyzed the prior decisions and found no inconsistency.

On appeal, a three-judge district court unanimously upheld the Commission's cease-and-desist order. After considering and rejecting the arguments advanced by appellant (App. 42a–48a), the court concluded that the term "iron and steel articles" has "been narrowly construed within the steel and transportation industry" and has "never comprehended finished products of any degree of complexity or manufacture" (App. 48a–49a). It ruled that the Commission's construction of the certificate was in accord with the evidence and "wholly reasonable" (App. 49a).

ARGUMENT

This case is concerned with the narrow issue of the proper interpretation of appellant's certificate. Appellant urges that the phrase "iron and steel articles," as used in its certificate, be given a "lay" or dictionary interpretation and thus be read to cover any article made from iron and steel (Juris. St. 18, 25, 27). We submit, however, that the Commission, relying upon Commission and trade usage and other evidence of record, properly found that the phrase covered rough or semi-finished articles made from iron and steel but did not encompass such finished commodities as tractors and traction engines.

1. Appellant's principal contention (Juris. St. 12–16) is that the Commission improperly based its decision on the *Descriptions* case (*Descriptions in Motor*

Carrier Certificates, 61 M.C.C. 209), a 1952 proceeding in which the Commission adopted commodity descriptions or lists "intended to control the interpretation of certificates issued subsequent to such decision" (App. 19a). But the Commission explicitly recognized that the commodity lists in *Descriptions* are binding only as to certificates issued thereafter (App. 6a, 19a). As the lower court correctly found (App. 46a), the Commission, rather than relying on *Descriptions* as "determinative," simply "noted it as one of several factors for proper consideration." The definitions or lists there established by the Commission were based on the general understanding of the terms within the motor carrier and other industries involved (App. 45a). Thus, the Commission in *Descriptions* stated (61 M.C.C. at p. 245) that the phrase "iron and steel articles" is a commodity description "that has been used for years * * * [and] is understood in transportation circles to mean a list of rough or semi-finished articles made from iron and steel * * *."[3] In the circumstances, the Commission could properly take into account its holding in *Descriptions* as one of several pertinent considerations. Cf. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561.

2. The "other errors on the part of the Commission" (J. St. 16) alleged by appellant are similarly

[3] The "iron and steel articles" list contained in *Descriptions* is similar to one proposed by several steel manufacturing companies and was approved by an association of carriers engaged in transporting iron and steel articles. The Commission in *Descriptions* stated (p. 247) that the "industry-proposed list does not include every kind of iron and steel article, nor is it so intended," and specifically does not "include farm machinery and many other articles made entirely from steel."

without merit. Contrary to its claim (Juris. St. 16–18), the Commission did not modify its certificate in violation of the provisions of Section 212, 49 U.S.C. 312. The Commission simply *interpreted* the phrase "iron and steel articles," as used in the certificate, to mean rough or semifinished articles made from iron and steel, and not including the "complex mechanical assemblages" (App. 35a–36a), and related items, such as tractors and traction engines, listed in its cease-and-desist order.[1] This Court has made clear that "Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, * * * unless found to be clearly erroneous." *Nelson, Inc.* v. *United States*, 355 U.S. 551, 559, n. 4; see, also, *Jones Truck Lines* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark.); *Willers* v. *United States*, 133 F. Supp. 270, 275 (D.S. Dak.).

Appellant urges (pp. 18–20) that the Commission erred in considering the certificate to be so patently unambiguous as not to require inquiry into the intent of the framers. As the court below found (App. 46a), "it is clear from the record, from transportation parlance and from various cited cases that there is noth-

[1] While some finished articles are embraced in the phrase "iron and steel articles," they "are of uncomplicated design, with no moving parts, and at a stage of manufacture just beyond the in-the-rough or semifinished classification." *Atlanta-New Orleans M. Freight Co.* v. *Eagle Motor Lines*, 69 M.C.C. 257, 260. Examples of such items, which appellant has authority to transport, are anchor chains, manhole covers, bolts, nails, pipe and castings.

ing patently ambiguous in plaintiff's certificate." But, in any event, the Commission went further (cf. *Nelson, Inc.* v. *United States, supra*, at p. 558, note 3); it did examine the proceedings leading to the certificates "in order to determine what was intended" (App. 18a), and found nothing to indicate "even remotely" any intent to grant authority to transport the commodities in issue or to support contentions that appellant had any "grandfather" rights to transport such goods (App. 15a–19a).

Appellant's claim (Juris. St. 23–26) that the Commission ignored the evidence of its industry witnesses is squarely contradicted by the Commission's decision, which gave "full consideration" to that evidence (App. 21a). The weight to be accorded the evidence was for the Commission (*United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 490–491; cf. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739), and the court below properly found that "in the light of the testimony of plaintiff's witnesses, * * * the action of the Commission was not arbitrary, capricious or clearly erroneous" (App. 47a).

Finally, appellant argues (Juris. St. 26–29) that the Commission's decision is inconsistent with prior Commission decisions. But appellant cites no case where the Commission had held the complex commodities in question to be covered by the term "iron and steel articles." The Commission in its second report on reconsideration carefully considered (App. 30a–36a) the prior decisions and concluded that none of them supported giving the "broad and all-inclusive

meaning" (App. 34a) to the term "iron and steel articles" contended for by appellant; that, on the contrary, these decisions called for the more restrictive construction it was adopting. It pointed out (App. 36a) that under appellant's interpretation (permitting transport of any commodity made from iron and steel), appellant could carry not only the commodities in issue but "many other articles, such as the typewriters, automobiles, and locomotives * * * [and thus] would be able to invade the fields of * * * numerous other carriers without making the required showing of public need for its service." See *Black* v. *Interstate Commerce Commission*, 167 F. 2d 825, 828 (C.A. 5), certiorari denied, 335 U.S. 818; *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, 392.

It is well settled that the Commission's interpretation of its own permits and certificates "is controlling on the courts unless clearly erroneous." *Nelson, Inc.* v. *United States, supra*, at p. 558; see, also, *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, affirmed, 345 U.S. 980. Plainly, the Commission was not unreasonable in its construction of appellant's certificate.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.
RICHARD A. SOLOMON,
HENRY GELLER,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 823

SIMS MOTOR TRANSPORT LINES, INC., an Illinois CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal From the United States District Court for the Northern District of Illinois

MOTION TO BE NAMED PARTIES APPELLEE AND FOR LEAVE TO FILE MOTION TO AFFIRM

REX EAMES
1800 Buhl Building
Detroit 26, Michigan
WOodward 1-5905

ROLAND RICE
618 Perpetual Building
Washington 4, D. C.
REpublic 7-7173

Attorneys for Intervenors

Of Counsel

FRANKLIN R. OVERMYER
111 W. Monroe Street
Chicago 3, Illinois
RAndolph 6-1025

April 1960

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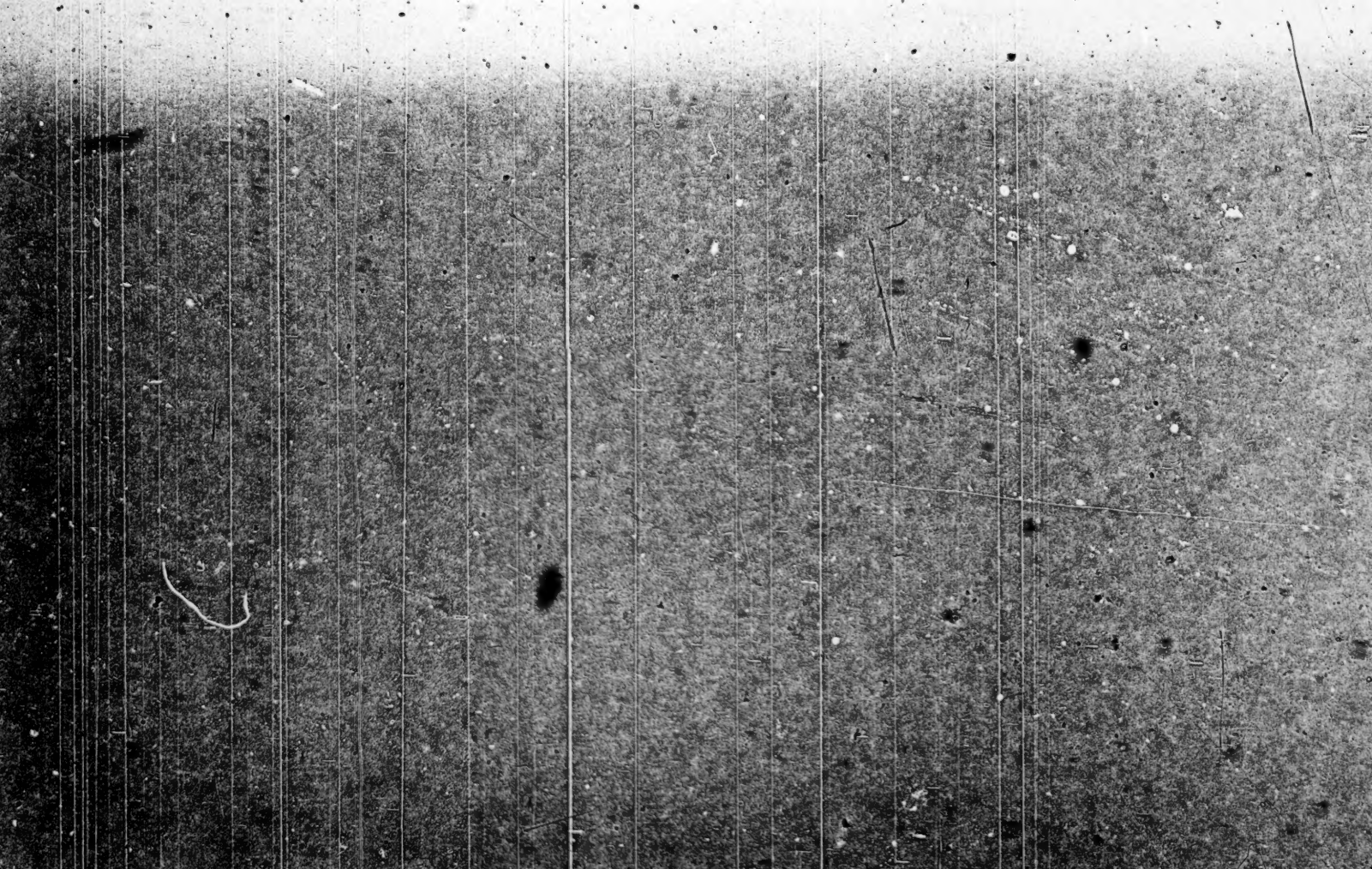

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MOTION TO BE NAMED PARTIES APPELLEE AND FOR LEAVE TO FILE MOTION TO AFFIRM

Now come, Holland Motor Express, Inc., Doyle Freight Lines, Inc., C. A. Conklin Truck Line, Inc., Saginaw Transfer Company, Inc., Kramer Bros. Freight Lines, Inc., Interstate Motor Freight System, Wolverine Express, Inc. and The Regular Common Carrier Conference of American Trucking Associations, Inc., and file this motion to be named parties appellee, and for leave to file a motion to affirm the decision of the District Court.

The interest and standing of these movants arises from the fact that they were parties to the proceeding

before the District Court, having been granted leave to intervene upon their petition duly filed. They appear here in support of the position of the Interstate Commerce Commission which is being supported also by the United States of America. The intervenors embrace seven general commodity motor common carriers of property operating in interstate commerce pursuant to authority issued by the said Commission, and an association of more than 2,000 motor common carrier members. Because the interpretation sought by appellant, if approved, would greatly expand its operations and thus its competition and the competition of literally hundreds of other motor common carriers with similar authority, the interest of these movants in the outcome of this controversy is very substantial.

Appellant is requesting this Honorable Court to review and upon review to reverse the judgment of the Court below upholding the validity of the interpretation made by order of the Interstate Commerce Commission. As noted above the issues of law raised by the appellant directly involve the interests and concerns of these movants and, accordingly, they have a substantial interest in the disposition of this proceeding.

These movants as of April 26, 1960, filed a motion to affirm the order of the District Court, believing that they were, by reason of participation in the proceeding in the Court below, automatically intervening defendants herein, this Court's rules being silent on the subject, and a copy of the appellants jurisdictional statement having been served upon movants' counsel. A question has been raised as to these movants' standing when not specifically named defendants herein;

therefore, this motion is filed out of an abundance of caution.

WHEREFORE, these movants respectfully request that to the extent they are not parties defendant to this case by implication they be named specifically as parties defendant and that the motion to affirm timely filed by them on April 26, 1960, in opposition to the jurisdictional statement be received with respect thereto.

Respectfully submitted,

REX EAMES
ROLAND RICE
Attorneys for Intervenors

Of Counsel

FRANKLIN R. OVERMYER

April 1960

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for intervenors herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27th day of April, 1960, I served copies of the foregoing document on the several parties hereto, as follows:

1. On Sims Motor Transport Lines, Inc., by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney, Harold T. Halfpenny, Esq., 111 West Washington Street, Chicago, Illinois.

2. On the United States of America, by mailing a copy in a duly addressed envelope, with postage prepaid, to J. Lee Rankin, Solicitor General, and Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

ROLAND RICE

MAY 11 19[illegible]
JAMES R. BROWNING,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 823

SIMS MOTOR TRANSPORT LINES, INC.,
an Illinois Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
Appellee.

On Appeal from the United States District Court
For the Northern District of Illinois

REPLY TO MOTION TO AFFIRM

HAROLD T. HALFPENNY,
111 W. Washington Street,
Chicago, Illinois,
Attorney for Appellant.

RICHARD F. HAHN,
JAMES F. FLANAGAN,
MARY M. SHAW,
Of Counsel.

The Scheffer Press, Inc., ANdover 3-6850

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1959

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UNITED STATES OF AMERICA,
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Appellee

On Appeal From the United States District Court
For the Northern District of Illinois

REPLY TO MOTION TO AFFIRM

QUESTION PRESENTED

In its Brief the government refers to the authority of Sims to transport "iron and steel articles." It does mention in a footnote on page 2 that "iron and steel and articles made thereof" is included in the authority granted. This, of course, is the fact (J. St. 7), and the broader authority must, of course, be considered.

ARGUMENT

The government's Motion to Affirm ignores the basic question before the Court at this time. Our argument was directed to showing that the questions presented are of sufficient importance to warrant the attention of this Court.

This is in accord with Rule 15 (f) of this Court, which provides that a jurisdictional statement shall state "the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." This question is the main thrust of our argument (J. St. 16, 18, 31), and one which the government ignores.

The point now is something more than whether the decision of the lower court was right or wrong. The question now is whether we should be allowed to fully brief and argue all these points before this Court. The value of oral argument is well recognized, and we believe that we have stated a case of sufficient importance to warrant our day in court.

For example, we argued that not only has the "Description Case" been misused in this instance, but that it is a continuing policy on the part of the Commission to misuse that case. As we pointed out in our original Brief (J. St. 12-18), the Commission (with the erroneous approval of the lower court) has come to *say* that it is giving independent consideration to the problems before it, while as a matter of fact it relies more and more heavily on "Descriptions." Merely saying something doesn't make it so. In that connection (J. St. 15), we cited a case later than this one which, relying on this case, followed the

same path. This demonstrates the trend which is being established, and which will gather momentum like a two-ton truck going down a mountain, if this Court does not put on the brakes.

Similarly, the question of whether this certificate was "interpreted" or "modified" is of great importance and should be examined by this Court. The question is whether the Commission shall be allowed to *say* it is "interpreting" a certificate, and thus, as by an incantation, change what is in fact a modification into an interpretation. It is what the Commission *does*, that counts, not what it says. As we pointed out in our original Brief (J. St. 16-18), what the Commission did here was actually to severely restrict the long-established meaning of the authority of Sims Motor Company. Surely this is not a mere "interpretation."

We further showed in our original Brief (J. St. 26-29) that the Commission's decision was inconsistent with prior decisions. Of course, we did not cite a case precisely like this one, because, so far as we know, there has been none. Naturally, we argued from analogies. And since that Brief was written a further inconsistency has developed. *Starr's Transportation, Inc.* (No. MC 117147, reprinted C.C.H. Federal Carriers Reporter § 34, 870), decided April 4, 1960, held that plywood doors (a manufactured product) were included in an authority to transport "plywood products." If this is the trend the Commission is now taking, then surely it was out of line in the instant case.

The government concludes its Brief with the oft-repeated cry that "The Commission interpretation of its own permits, and certificates 'is controlling on the courts unless clearly erroneous'." We believe that we have demon-

strated in our principal Brief that the Commission's interpretation is indeed "clearly erroneous." And further, we respectfully submit that in this case (and undoubtedly in many others), a blind and unwarranted reliance is habitually placed upon the findings of administrative bodies. In our system of government as established by the Constitution, the courts, not administrative bodies, are the proper arbitrators of disputes between the government and private persons.

CONCLUSION.

Substantial questions are presented by this appeal. We feel very strongly that we are entitled to fully present this question to this Court, and that an affirmance in the absence of such a presentation would not be proper.

Respectfully submitted.

HAROLD T. HALFPENNY
Counsel for Appellant.

RICHARD F. HAHN
JAMES F. FLANAGAN
MARY M. SHAW
Of Counsel.

COPY

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MAY 23 1960
JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1959

No. 823

SIMS MOTOR TRANSPORT LINES, INC., an Illinois Corporation, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Northern District of Illinois

MOTION OF INTERVENORS TO AFFIRM

REX EAMES
1800 Buhl Building
Detroit 26, Michigan
WOodward 1-5905

ROLAND RICE
618 Perpetual Building
Washington 4, D. C.
REpublic 7-7173

Attorneys for Intervenors

Of Counsel

FRANKLIN R. OVERMYER
111 W. Monroe Street
Chicago 3, Illinois
RAndolph 6-1025

April 1960

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IN THE

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Northern District of Illinois

MOTION OF INTERVENORS TO AFFIRM DECISION OF DISTRICT COURT

Now come, Holland Motor Express, Inc., Doyle Freight Lines, Inc., C. A. Conklin Truck Line, Inc., Saginaw Transfer Company, Inc., Kramer Bros. Freight Lines, Inc., Interstate Motor Freight System, Wolverine Express, Inc. and The Regular Common Carrier Conference of American Trucking Associations, Inc., Intervenors, and pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, hereby move to affirm the decision of the United States District Court for the Northern District of Illinois, Eastern Division, dated November 18, 1959, on the following grounds:

(1) That it is manifest the questions on which the decision in this cause depend are so unsubstantial as not to need further argument.

(2) That the District Court's decision in affirming the Order of the Interstate Commerce Commission here in question is in acordance with applicable law.

(3) That said Order of the Interstate Commerce Commission is wholly reasonable, and not arbitrary, capricious, or clearly erroneous.

STATEMENT

These intervenors were authorized by the District Court to intervene as parties, and they here appear in support of the position of the Interstate Commerce Commission in this proceeding. The intervenors consist of seven general commodity motor common carriers of property operating in interstate commerce pursuant to authority issued by the Defendant Commission, and one association of over 2,000 motor common carrier members. Since the interpretation sought by appellant would greatly expand its operations, if approved, and thus its competition and the competition of numerous other motor carriers with similar authority, the interest of intervenors in the outcome of this controversy is very substantial.

Appellant's Jurisdictional Statement sets forth a chronology of the proceeding before the Commission which led to the cause instituted by the appellant in the United States District Court for the Northern District of Illinois for a review of the Commission's Order. Thus, there appears to be no need to repeat such material in this Motion to Affirm.

ARGUMENT

This Court is requested by appellant to review an Order of the Interstate Commerce Commission involving a construction of certain motor carrier operating authority issued to appellant by said Commission. The finding of the Commission was that appellant's authority to transport "iron and steel articles", "iron and steel products", and "iron and steel and articles made thereof" does not authorize the transportation of "tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery".

The appellant's position in the proceedings before the Interstate Commerce Commission was that the aforementioned commodities fall within the scope of the described authority for either of two reasons:

(1) The commodity descripitions in question on their face embrace such commodities in light of the usual meaning accorded such language by the motor carrier industry and the Commission in its prior decision; or

(2) Such commodity descriptions must be more broadly construed in the appellant's individual case in view of the particular circumstances involved in the proceedings before the Commission in which the grants of authority here in question were made.

Before analyzing the merits of appellant's position, it is proper to consider its burden before this Court and the scope of judicial review accorded decisions of the Interstate Commerce Commission. The Commission has ruled in a manner contrary to the dual argu-

ments of appellant noted above. Under the holding of this Court in *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1957), appellant here has the burden of establishing that the order of the Commission under review is clearly erroneous. This Court stated in the *Nelson* case that a "subsequent construction of the grandfather permit by the Commission is controlling on the Courts unless clearly erroneous" (p. 558). The *Nelson* decision has ample support in prior decisions of this Court. *United States* v. *Pierce Auto. Freight Lines*, 327 U.S. 515 (1946); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; and *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

Thus, the appellant's burden before this Court, as it was before the three-judge District Court, is to establish that the ruling of the Interstate Commerce Commission here in question is plainly and clearly erroneous. In this connection, the following finding of the District Court is most significant:

> "We find that the Commission's unanimous determination that tractors and foundry equipment are not iron and steel articles or products, is not arbitrary, capricious, or clearly erroneous, but, is, on the contrary, wholly reasonable."

The District Court reached the foregoing conclusion after carefully and thoroughly considering each of the arguments and contentions presented by appellant, and which now appear to be the same arguments and contentions presented to this Court. Each of the alleged errors set forth by appellant in its Jurisdictional Statement will be considered hereafter. However, Intervenors' argument in support of the Commission's order and the decision of the District Court

will be divided into two basic issues, as hereinafter delineated.

ISSUE ONE

Do the Commodity Descriptions in Appellant's Certificate on Their Face Embrace the Commodities in Question in Light of the Usual Meaning Accorded Such Commodity Descriptions by the Motor Carrier Industry and the Interstate Commerce Commission?

Before examining the merits of this issue, it would be well to consider appellant's argument that this proceeding may result in a violation of the provisions of Section 212 of the Interstate Commerce Act (Title 49 U.S.C.A. Section 312), which provides that a certificate may not be "suspended, changed or revoked" unless certain procedures are pursued. Appellant directs our attention to several cases construing and applying the provisions of Section 212, such as *Watson Brothers Transportation Company* v. *United States*, 132 F. Supp. 905, affirmed 350 U.S. 927. An examination of the *Watson* case reveals its complete inapplicability to the type of proceeding here involved and the particular circumstances here in question. There the right of the Commission to issue a revised certificate outside the terms of Section 212 of the Interstate Commerce Act (49 USCA 312) was before the Court; here the issue is the Commission's interpretation of a certificate, and not the physical rewriting of that document. The distinction is great and controlling. This error of appellant in failing to differentiate colors its entire approach and, in our view, destroys the thrust of its argument.

This Court has always recognized and upheld the right of the Interstate Commerce Commission to make and provide reasonable constructions of the language

used by the Commission in outstanding certificates and permits. See, *Nelson* v. *United States*, supra. The sole inquiry in the long proceeding before the Commission in this case was the *correct construction* of appellant's authority, and a review of the record in this case amply demonstrates that no modification or revocation of authority is here presented.

Turning then to the first issue, what is the general meaning accorded the terms "iron and steel articles" and "iron and steel products" by the iron and steel industry and the motor carrier industry? In *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, the Interstate Commerce Commission set forth commodity lists under class or generic headings specifying the commodities embraced by such class or generic headings. While the Commission expressly stated that such commodity lists would be *binding* only on *future certificates*, the Commission, nevertheless, endeavored to ascertain the trade meaning accorded such class or generic headings by the transportation industry up to that time. Quite obviously, it would be foolish for the Commission to establish definitions of commodity descriptions for application in the future where such definitions were not already in accord with the general understanding of these terms within the motor carrier industry.

One of the generic classifications dealt with by the Commission in the *Descriptions* case was "iron and steel articles". The Commission, after extensive hearings throughout the country participated in by hundreds of motor carriers and interested parties, expressly found that "the phrase 'iron and steel articles' is understood in transportation circles to mean a list of rough or semifinished articles made from iron and

steel . . ." (at p. 245). The overwhelming testimony showed that the terms "iron and steel articles" or "iron and steel products" had been historically associated in the transportation industry with the service rendered for the basic steel mills. As noted, this finding was predicated upon evidence submitted by motor carriers, motor carrier associations, shippers, shipper organizations, rail carriers and other parties who participated in such proceeding.

While the list of commodities set forth in the *Descriptions* case as falling under the generic classification of "iron and steel articles" included some finished products, the Commission, in *Atlanta-New Orleans Motor Freight Co.* v. *Eagle Motor Lines, Inc.*, 69 M.C.C. 257, noted that such finished products "are of uncomplicated design, with no moving parts, and at a stage of manufacture just beyond the in-the-rough or semi-finished classification" (at p. 260). An examination of such commodity lists set forth in the *Descriptions* case corroborates this point.

In *Atlanta-New Orleans Motor Freight Co.* v. *Eagle Motor Lines, Inc.*, supra, the Commission determined that the term "iron and steel articles" authorized the transportation of wire garment hangers which consisted "of little more than steel wire which has been shaped and enameled" (at p. 261). Surely, there is no parallel between such wire garment hangers and the professionally engineered tractors, traction engines and foundry machinery involved in this cause.

In *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, the Commission ruled that the term "metal products" does not embrace refrigerators. In so ruling, the Commission stated as follows:

> "A modern mechanical refrigerator is an assemblage of many individual items, some of which considered alone might be classified as metal products, some of which might collectively be referred to as machinery, and some of which are definitely not within either classification such as insulating materials, rubber products, refrigerants, and plastics. Of particular significance, however, is the fact that, in the course of manufacture, the various components lose their identity as such and are transformed into another composite article, namely a refrigerator, which has a name, character, and use separate and distinct from the components. The finished product is universally known as a refrigerator, is referred to as such in the trade, and is classified as such in National Motor Freight Classifications. Similarly, metal products and machinery, which have been transformed into an automobile, and paper which has been transformed into roofing, have lost their original identity of its own." (at pp. 393-4)

Further, the Commission noted that the term "metal products" might, in its broadest sense, be used to describe any article made entirely, or principally of metal. However, the Commission found that:

> "Through common usage, however, particularly in transportation parlance, both of the considered terms have taken on a much more restrictive meaning, separate and distinct from an academic definition of the words utilized, and articles which might conceivably or technically be considered as 'metal products' or 'machinery' are not generally comprehended by or even associated with such terms. Thus, a watch is not generally associated with either of these items, although it would probably fall within academic definitions of both. Similarly, machinery is not generally associated with the term 'metal products' and was made the subject

> of specific authorization herein, although most machinery would fall within a broad definition of 'metal products', since most machinery is made of metal." (at p. 392)

Thus, if appellant's authority to transport "iron and steel products", "iron and steel articles" and "iron and steel and articles made thereof" is construed in the light of the general meaning accorded these descriptions within the motor carrier industry, wholly aside from the particular circumstances surrounding the grants of authority here in question, it is most strongly urged that the Commission has acted correctly in ruling that appellant is not authorized to transport such traffic as tractors, traction engines, and used foundry machinery. Quite plainly, each of these commodities is an assemblage of many individual items. Through the course of manufacture, the various components have lost their identity as such and have been transformed into composite articles which have a name, character and use separate and distinct from the components.

Appellant's Jurisdictional Statement contains several arguments and contentions that are pertinent to the foregoing discussion. First, appellant argues that the Commission has made improper use of the *Descriptions* case and that the Commission is now relying too heavily on that case for the purpose of interpreting certificates in existence at the time of the promulgation of that decision. The Report of the Interstate Commerce Commission of July 15, 1957, (Page 13a of appellant's Jurisdictional Statement,) plainly discloses that the Commission did *not* consider the *Descriptions* case as controlling. Rather, the Commission did no more than to use the *Descriptions* case as *one* source of

interpretative material respecting the commodity descriptions here in question. Additional interpretative aids used by the Commission included opinion testimony submitted by appellant. The Commission stated:

> "We have given full consideration to the opinions expressed by witnesses called by Respondent in the title proceeding to the effect that, in their view, the commodities in issue are 'iron and steel articles', 'iron and steel products', or 'iron and steel and products made thereof', and we have considered the academic meanings submitted." (at p. 21a of Jurisdictional Statement)

Further, the Commission considered rulings made in cases other than the *Descriptions* case. For example, *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391; *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447; *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695; and others. It is one thing to use the *Descriptions* case as the controlling decision here; it is another thing to consider it, and to supplement that consideration by additional tests. This the Commission did and the district court properly found its approach was wholly reasonable.

Lastly, the Commission, on its own motion and as an aid interpretation, reopened each of the basic proceedings from which the grants of authority here in question resulted. The Commission carefully reviewed the evidence presented in those basic proceedings to determine whether that evidence would justify a broader meaning than that normally accorded the commodity descriptions in question. This review of the basic proceedings by the Commission will be discussed more thoroughly at a later point herein. It is mentioned here only for the purpose of demonstrating that *the Commission utilized all possible*

sources of aid in arriving at a fair and reasonable construction of appellant's certificates. In so doing it went beyond what it would probably be required to do under the statute or under court decision.

Next, appellant complains that the Commission erred "in failing to give due consideration to the interpretation as given by the industry". In this connection, appellant argues that the "five traffic experts" called by appellant in this proceeding had a total of 161 years in the transportation nationally of the commodities here in question and that these witnesses "testified unequivocally that in the transportation industry and in the iron and steel industry the commodity description 'iron and steel products' embraces any commodity manufactured principally from iron or steel, including the commodities in question in this proceeding" (at p. 25 of Jurisdictional Statement).

In the first place, appellant greatly overstates the testimony of the five witnesses in question. Four of the five witnesses were employees in shipper traffic departments, and they simply testified that they had been using appellant's services for some time in the belief that appellant was authorized to transport their products. Not one of these witnesses endeavored to testify as to the normal meaning and construction accorded these commodity descriptions by either the motor carrier industry or iron and steel manufacturers. The appellant's fifth so-called expert witness candidly admitted that he was "not an expert" in the construction of commodity descriptions (see p. 100 of transcript of hearing of December 13, 1959).

Appellant's real complaint is not that the Commission failed to give due consideration to the trade mean-

ing of the subject language. Rather, appellant seems only to disagree with the Commission's conclusion as to the trade meaning accorded this language in the motor carrier industry. The Commission gave full consideration to the opinion testimony offered by appellant's witnesses as well as the opinion testimony of certain witnesses called in that proceeding by the Commission's Bureau of Inquiry & Compliance. Further, the Commission is fully entitled under law to draw upon its own expert knowledge in these matters and, particularly, the exhaustive record in the *Descriptions* case. It is clear, therefore, that there was ample evidence to support the Commission's construction of appellant's authority and that this construction should not be disturbed on appeal.

Appellant argues also that the Commission erred "in limiting the commodities to be transported to correspond precisely with those specifically mentioned in other proceedings". This argument is unsound in that its premise is not accurate. The Commission in this proceeding has not construed appellant's authority so as to limit it to the transportation of only those specific commodities handled during the "grandfather" period. The Commission has here ruled that the terms "iron and steel articles" and "iron and steel products" include *all* rough or semifinished articles made from iron and steel, as typified in the commodity lists set forth in the *Descriptions* case. Clearly, neither appellant nor its predecessors handled every one of those many commodities set forth in the commodity lists in the *Descriptions* case during their "grandfather" periods. Nevertheless, the Commission recognizes the right of appellant to handle all of such commodities. The essence of the Commission's de-

cision in this case is solely but firmly that this particular carrier's authority was never intended to cover the transportation of finished products such as tractors, traction engines, and foundry machinery."

Appellant also argues that the Commission has here failed to follow its own definition of the word "products" as provided in prior decisions of the Commission. Appellant cites *Wilson Common Carrier Application*, 64 M.C.C. 39, which dealt, in part, with the commodity description "wire products". It may well be true that the term "products" has a broader meaning under certain circumstances than is true in the commodity descriptions here involved in this proceeding. But the vital inquiry in this case is the proper meaning of the term "iron and steel products" or "iron and steel articles", and the record is perfectly clear why the Commission has construed these terms in the manner set forth in its orders and report here on appeal. The historical origin and evolution of these terms within the motor carrier industry has been reviewed extensively, and that history demonstrates that such terms were never intended to encompass all articles or products made from iron or steel.

Thus, in brief summary, these Intervenors respectfully submit that the Commission has provided a fair and reasonable construction of the meaning of the subject commodity description as these terms are understood and used in the motor carrier industry. There is substantial evidence in this proceeding to support the Commission's construction, and, therefore, it is clear that the appellant has not established that the order of the Commission is arbitrary, capricious or clearly erroneous.

ISSUE TWO

Should the Commodity Description Here in Question be More Broadly Construed in the Appellant's Individual Case in View of the Particular Circumstances Involved in the Proceedings Before the Commission in Which the Grants of Authority Here in Question Were Made?

Appellant's present certificate contains various grants of authority obtained either through "grandfather" proceedings or subsequent acquisitions. A portion of appellant's certificate involves authority to transport "iron and steel articles" from Chicago to Indiana, Ohio and Kentucky, and this authority was obtained by the carrier from Jack Foss and Elmer Sims, doing business as Motor Transport Lines, who obtained such authority based upon "grandfather" operations in existence on June 1, 1935.

Appellant adduced oral testimony in this case from shippers in an effort to show that the "grandfather" operations of Motor Transport Lines had included the transportation of such commodities as tractors, farm machinery, engines, etc. (see p. 7, Jurisdictional Statement).

Mr. Elmer Sims adduced substantially comparable testimony in this proceeding. The apparent purpose of such evidence would seem to be to seek broader construction of the term "iron and steel articles" than would otherwise obtain. In other words, appellant here argues that the Commission, at the time of the issuance of such grants of authority, intended a broader grant than would otherwise be warranted by the general meaning of the terms employed.

As is shown in the Report and Order of the Commission, dated July 15, 1957, the Commission reopened and re-examined all of the evidence offered in each of the

four basic proceedings as an interpretative aid in construing the grants of authority there made. After presenting a detailed resume of such examination, the Commission concluded as follows:

> "There is nothing of evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that respondent's predecessors were being granted authority to transport tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, or that they then understood they were obtaining such authority. Contrary to the claims of respondent there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended. Nevertheless, we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding." (pp. 18a and 19a of Jurisdictional Statement)

As above noted, appellant adduced testimony in this proceeding that prior to June 1, 1935, its predecessor had allegedly handled certain commodities that would be considered finished products and, therefore, not falling within the terms "iron and steel articles", and "iron and steel products" as these terms have been construed herein. Obviously, such evidence was *not* part of the record in the grandfather proceeding and cannot be considered as material in determining the original intent in the issuance of the subject authority. On this particular point, the District Court stated:

> "In any event, if plaintiff believes that the scope of his certificate is too restrictive when considered

against its background, his remedy is to petition the Commission to reopen the grandfather proceedings. *Nelson* v. *United States*, supra, at pp. 561, 562. This proceeding is concerned only with the interpretation of the certificate as it now exists." (p. 48a Jurisdictional Statement)

From the foregoing, it is plain that there is no basis for concluding that the Commission intended a broader grant of authority to appellant or its predecessors than would be encompassed by the normal meaning accorded the commodity descriptions by the motor carrier industry. The Commission reviewed each of the grandfather proceedings carefully and found no evidence to support appellant's contentions to the contrary.

CONCLUSION

We submit that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission, and that this case presents no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted.

REX EAMES
ROLAND RICE

Attorneys for Intervenors

Of Counsel:

FRANKLIN R. OVERMYER

April 1960

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for intervenors herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27 day of April, 1960, I served copies of the foregoing document on the several parties hereto, as follows.

1. On Sims Motor Transport Lines Inc., by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney, Harold T. Halfpeny, Esq., 111 West Washington Street, Chicago, Illinois.

2. On the United States of America, by mailing a copy in a duly addressed envelope, with postage prepaid, to J. Lee Rankin, Solicitor General, and Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

ROLAND RICE